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Supreme Court, U.S.
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In The
Supreme Court of the United States

LONGVIEW INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

RANDALL COGGIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's required procedures for terminating a public employee with a property interest in continued employment includes not just an opportunity for a pre-termination hearing but also the opportunity to exhaust available state judicial review procedures prior to discharge?

2. Whether causation under 42 U.S.C. § 1983 and the identification among two independent state actors of which one, if either, deprived a person of a constitutionally required opportunity for a hearing must be established by a direct causal link in order for liability to attach?

3. Whether a court may decide a case on a theory not raised, briefed, or argued by the parties, when that new-found theory would fundamentally impact a party's position regarding such issues as the potential damages that may be recovered?

LIST OF PARTIES

Petitioner is Longview Independent School District. Respondent is Randall Coggin.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Longview Independent School District (hereafter, the "School District" or "LISD") respectfully requests that the Court issue a Writ of Certiorari to review and correct the opinion and judgment on rehearing en banc of the United States Court of Appeals for the Fifth Circuit. Based upon a theory never raised or argued by the parties, the en banc majority has grafted state judicial review procedures onto the Fourteenth Amendment's pre-termination process that is required prior to the discharge of a public employee who has a protected property interest in continued employment. In doing so, the en banc majority has created a constitutional mandate never before recognized and eviscerated the causal connection required by 42 U.S.C. § 1983.

OPINIONS BELOW

The en banc majority opinion and the three en banc dissenting opinions of the U.S. Court of Appeals for the Fifth Circuit in *Coggin v. Longview Indep. Sch. Dist.* are reported at 337 F.3d 459 and reproduced at App. 1. The Fifth Circuit order granting rehearing en banc and vacating the prior panel opinions is reported at 309 F.3d 307 and reproduced at App. 79.

The vacated panel majority and panel dissenting opinions of the Court of Appeals are reported at 289 F.3d 326 and reproduced at App. 48.

The final judgment, memorandum opinion, and findings of fact and conclusions of law of the United States District Court for the Eastern District of Texas all are

unpublished and are reproduced at App. 81, App. 83, and App. 122, respectively.

JURISDICTION

The judgment on rehearing en banc of the Court of Appeals for the Fifth Circuit was entered on July 2, 2003. App. 46. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition involves the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. The Fourteenth Amendment provides, in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

Section 1983 provides as follows:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The federal procedural due process questions presented by the Petition also arise in the context of the following state statutes. (1) Texas Education Code Chapter

21, Subchapters E ("Term Contracts") and F ("Hearing before Hearing Examiners") specify the state law duties and procedures for a public school district to terminate a teacher's term contract of employment in mid-contract. Those provisions, TEX. EDUC. CODE ANN. §§ 21.201-21.260 (Vernon 1996), are included at App. 146. (2) TEX. EDUC. CODE ANN. § 7.057 (Vernon 1996), reproduced at App. 162, allows a person aggrieved by a decision of the State Commissioner of Education (the "Commissioner") to appeal into state court. (3) TEX. GOVT. CODE ANN. § 2001.176 (Vernon 2000), reproduced at App. 164, establishes a 30-day period for an aggrieved person to appeal into court from a decision of a state administrative agency in a contested case.

STATEMENT OF THE CASE

A. Coggin Was Discharged in 1999 under the State Law Procedures Governing the Mid-contract Termination of School Employees.

Respondent Randall Coggin ("Coggin") was employed by the School District as a supervisor under a two-year term contract of employment for the 1998-1999 and 1999-2000 school years. During the Summer of 1999, the LISD Board of Trustees proposed the termination of Coggin's contract under Texas Education Code Chapter 21. The LISD Superintendent prepared a notice letter listing four reasons for the proposed termination and summarizing the evidence in support. The reasons for the proposed termination included allegations that Coggin (1) "made comments to and/or had physical contact with female employees in a manner which [was] inappropriate and unprofessional for the workplace," (2) "used Longview ISD

resources for personal advantage," (3) "impeded, obstructed, and/or interfered with the Longview ISD's investigation of [his] conduct by directing . . . a subordinate to withhold information and/or not to cooperate with the district's investigation," and (4) "made false entries in Longview ISD asbestos management records" (Plaintiff's Exhibit 15, "P-15," pp. 1-2).

The notice letter also specifically informed Coggin of his opportunity for a hearing over the proposed termination in accordance with state law. The letter stated, "If you desire a hearing on this proposed termination, you must file a written request with the Commissioner of Education within 15 days from your receipt of this letter." (P-15, p. 2).

Coggin received LISD's notice of proposed termination on August 12, 1999, and he thus had until August 27, 1999, to file his request with the Commissioner at the Texas Education Agency ("TEA") asking that a hearing examiner be appointed. On August 24, 1999, Coggin mailed a letter to the Commissioner requesting the appointment of a hearing examiner for the proposed termination of his employment contract. Coggin's letter was not received by TEA until August 30, 1999 (P-21).

By letter dated September 2, 1999, the Deputy Chief Counsel for TEA notified both Coggin and counsel for LISD that (1) Coggin's request for the assignment of a hearing examiner was not timely filed, (2) he thus had failed to invoke the hearing process, and (3) TEA would not appoint a hearing examiner:

> In order to be timely filed, the request must have been received by August 27, 1999. By filing a late request, Mr. Coggin has failed to invoke the hearings process.

> No hearings examiner will be assigned based upon the untimely filing.

(P-21).

Rather than challenging the Commissioner's decision in state court, counsel for Coggin then began a series of correspondence with TEA (unbeknownst to the School District) about whether Coggin timely had filed his request for a hearing examiner and whether the Commissioner should reconsider his refusal to appoint a hearing examiner. Counsel for Coggin characterized TEA's action as having "denied my client his due process." (P-29). TEA's Deputy Chief Counsel, however, informed Coggin's attorney that the Agency stood by its original decision: "The request for assignment was not received timely. No hearing examiner will be assigned." (P-28).

LISD (1) had received the letter from TEA that no hearing examiner would be appointed, and (2) lacked authority under state law after 1995 for the School Board, itself, to hold an evidentiary termination hearing. Consequently, the Superintendent recommended to the Board that it follow through on the recommended termination of Coggin's employment based on the reasons outlined in the notice letter of proposed termination.

At a meeting of the LISD School Board held on September 13, 1999, the Board voted unanimously to adopt a resolution for the termination of Coggin's term contract and to discharge him effective that same date. The Board resolution duly noted that the "Texas Education Agency received notice from Randall Coggin requesting the appointment of a Certified Hearing Examiner" and "according to the Texas Education Agency, the request was not timely filed." By letter dated September 16, 1999, Coggin

was notified in writing of the LISD Board's unanimous action and provided a copy of the Board resolution (P-23).

B. The 1995 Revisions to the Texas Education Code Applicable to Coggin's Discharge Drastically Altered the Prior State Procedures Governing the Mid-contract Termination of School Employees, and Coggin Acknowledges That Those Post-1995 Procedures Meet the Requirements of Constitutional Due Process.

In 1995, the Texas Legislature substantially rewrote the Texas Education Code and enacted new mandatory procedures that a school district must follow in order to terminate an employee (like Coggin) holding a term contract of employment. With the 1995 changes to the Education Code, "[t]he hearings law for . . . mid-contract actions changed dramatically from prior law." Ellen Williams, *Annual Survey of Texas Law*, 49 SMU L. Rev. 901, 924 (1996). The 1995 reforms eliminated the former Code provisions which provided for "full-blown hearings before the board of trustees" and instead substituted the use of "independent fact finders who are certified hearing examiners" to provide the evidentiary hearing over a proposed discharge. *Id.* at 922-24.

Before 1995, the school board provided all procedures that constitutionally were due in conjunction with a proposed discharge, *i.e.*, the board conducted the termination hearing, received evidence, heard witness testimony, decided all facts, and voted either to retain or to discharge the employee.

After 1995, for terminations under current state law, Chapter 21 of the Texas Education Code parcels out

various mandatory and exclusive responsibilities to the employee, the Commissioner, and the school district's board of trustees. Under the post-1995 Education Code provisions (1) the employee who receives notice of proposed termination must file within fifteen (15) days a written request with the Commissioner for the appointment of a certified hearing examiner, (2) if such a request is timely filed, the Commissioner appoints a certified hearing examiner who conducts the due process hearing, receives and admits all evidence, weighs and judges witness credibility, and makes findings of fact and conclusions of law, and (3) the school board then conducts a non-evidentiary review of the findings and conclusions of the hearing examiner, may only change a finding of fact that lacks substantial evidence in the record created by the hearing examiner, and (after affording the parties the opportunity for oral argument) votes to retain or discharge the employee. App. 153. School districts, like LISD, lack the authority to direct the Commissioner to appoint a hearing examiner. Indeed, in the Court of Appeals Coggin acknowledged that (1) "[t]he ultimate decision to appoint (or not appoint) a hearing examiner rests *solely* with the TEA" and (2) "[t]he TEA refused Coggin's request for a hearing."

In this case, Coggin never has alleged that the state law procedures contained in Chapter 21 of the Texas Education Code governing the termination of school employees, like Coggin, are unconstitutional. To the contrary, throughout the case Coggin has acknowledged that "the district court properly assumed that those procedures met the requirements of constitutional due process."

C. Although Coggin Initially Filed Suit Against the School District, the Commissioner, and the Texas Education Agency Alleging That Those Three Defendants Violated His Right to Constitutional Procedural Due Process, He Later Voluntarily Dismissed the Commissioner and TEA from the Suit.

On November 12, 1999, Coggin filed his Original Complaint in federal court against the School District, the Texas Education Agency, and the Commissioner, alleging that the three defendants violated his procedural due process rights under the U.S. Constitution when Coggin's employment by LISD was terminated. Coggin later voluntarily dismissed both TEA and the Commissioner as defendants. Thereafter, although they no longer were parties to the suit, in his amended pleadings Coggin continued to allege that TEA and the Commissioner had violated his constitutional right to procedural due process.

To reiterate, in none of his pleadings did Coggin ever allege that the Texas Education Code procedures governing his termination were unconstitutional. To the contrary, throughout the case Coggin has acknowledged that "the district court properly assumed that those procedures met the requirements of constitutional due process." *See*, App. 110.

Coggin's suit proceeded to a three-day bench trial solely against the School District. The United States District Court for the Eastern District of Texas, Judge T. John Ward presiding, concluded that although the Commissioner had refused to appoint a hearing examiner to hold an evidentiary hearing over Coggin's proposed termination, the School District had caused a violation of Coggin's procedural due process rights. "Having found for

Coggin on his procedural due process claim," the court then considered additional issues such as the relief to award Coggin. App. 115. The district court issued its final judgment, memorandum opinion, and findings of fact and conclusions of law. App. 81, App. 83, and App. 122, respectively. The court awarded Coggin $215,894 in damages, plus costs, interest, and attorney's fees. App. 81.

The School District appealed. On April 17, 2002, the Fifth Circuit panel issued its majority and dissenting opinions. App. 48. The panel majority affirmed the rationale and judgment of the district court that LISD caused a violation of Coggin's procedural due process rights. The panel majority concluded that when the Commissioner refused to appoint a hearing examiner to hold an evidentiary termination hearing, the U.S. Constitution required the School District to employ "constitutionally valid alternatives" in order to avoid violating Coggin's procedural due process rights, *e.g.*, by re-sending the exact same notice of proposed termination a second time. App. 66. In a panel dissent, Judge Emilio M. Garza concluded that the Fifth Circuit should reverse and render "because Coggin has failed to establish a causal connection between the deprivation of his right to procedural due process and the actions of the LISD." App. 70.

On rehearing en banc, a total of four opinions were issued. The majority opinion was authored by Judge Dennis and supported by eight (8) judges. App. 1. Three separate dissenting opinions were authored by Judges Jolly, Jones, and Garza, each of which was supported by six (6) dissenting judges. App. 15, App. 19, and App. 27, respectively. The en banc majority upheld the judgment of the district court but rejected the rationale relied upon by both the district court and the panel majority. The en banc

majority concluded that the School District had caused the violation of Coggin's procedural due process rights because it had terminated Coggin's employment too quickly, thereby depriving him of judicial review of the Commissioner's decision and violating the requirements of constitutional procedural due process. According to the en banc majority, the pre-termination procedures mandated by the Fourteenth Amendment required the LISD School Board not to discharge Coggin until a 30-day, state-law review period had expired (thus affording Coggin, prior to discharge, an opportunity to seek judicial review of the Commissioner's refusal to appoint a hearing examiner). App. 8. The en banc dissenting opinions concluded that (1) the majority erroneously relied upon a new-found theory that was not raised, briefed, or argued by the parties, (2) there was no support in law or fact for the majority's new-found theory that Coggin's termination by LISD somehow denied him an effective appeal of the Commissioner's decision or violated his constitutional right to due process, and (3) the School District did not cause a violation of Coggin's procedural due process rights in connection with the termination of his employment when the Commissioner, not LISD, refused to appoint a hearing examiner to hold the evidentiary hearing over the proposed termination of Coggin's employment. App. 15.

REASONS FOR GRANTING THE WRIT

This case involves fundamental federal issues of what procedures are required to comply with the Due Process Clause and how causation is determined under § 1983. The procedural due process and § 1983 causation issues arise in a scenario in which two independent state actors

(*i.e.*, the School District and the State Commissioner of Education) each have mandatory and exclusive duties and procedures imposed under the Texas Education Code for satisfying the requirements of the Fourteenth Amendment.

When Coggin's discharge was proposed, the Commissioner refused to provide an evidentiary hearing for Coggin. Under the state procedures (which Coggin acknowledges meet the requirements for providing constitutional procedural due process), LISD lacked authority after 1995 for the School Board itself to hold such a hearing.

Based upon a theory never raised, briefed, or argued by the parties, the en banc majority has grafted state procedures for judicial review onto the Fourteenth Amendment's requirement of pre-termination procedural due process. The majority held that the School District violated Coggin's procedural due process rights by failing to afford Coggin, prior to discharge, a 30-day period in which to seek judicial review of the Commissioner's decision. According to the Fifth Circuit majority, the Due Process Clause itself now requires an opportunity to exhaust state review procedures as a *pre-termination* constitutional requirement.

The en banc majority expands constitutional procedural due process beyond all precedent. Under the decision of the en banc majority, the post-termination remedy of judicial review now is part of the pre-termination procedures that constitutionally are required prior to the discharge of a public employee with a property interest in continued employment. Texas may have a 30-day period for a party to seek judicial review of an administrative

decision, yet another State may have a similar period lasting one year or more. Under the constitutional analysis of the majority, the governmental employer in such a State must refrain from terminating an employee for a one year period as a constitutionally required pre-termination procedure and continue to pay the employee in the meantime.

Coggin never alleged or attempted to establish that the School District deprived him of an opportunity to seek judicial review of the Commissioner's decision. Instead, this is a case in which Coggin pleaded that his due process rights were violated because he was deprived of an opportunity for a hearing in connection with his termination. Moreover, it is also a case in which Coggin expressly has acknowledged that (1) "[t]he ultimate decision to appoint (or not appoint) a hearing examiner rests *solely* with the TEA" and (2) "[t]he TEA refused Coggin's request for a hearing." The en banc majority glosses over the requirement of causation and focuses instead on which state actor discharged Coggin, rather than which state actor failed to provide due process.

The erroneous opinion of the majority below is supported by the weight and authority of the Fifth Circuit sitting en banc. With its decision, the en banc majority failed to use a proper constitutional analysis and created a constitutional mandate never before recognized. Further, although arising in the context of the Texas statutes, the majority's flawed analysis applies widely to cases involving § 1983 issues of causation and the identification of the state actor responsible for a constitutional deprivation. Moreover, by founding its opinion upon a theory never raised, briefed, or argued by the parties, the en banc majority fundamentally has altered Coggin's theory of

recovery and deprived the School District of any opportunity to respond to such basic issues as the damages that Coggin properly could recover under the majority's newfound theory.

I. By Concluding That Pre-termination Procedural Due Process under the Fourteenth Amendment Encompasses the Separate Post-termination Remedy of an Opportunity to Exhaust Available State Review Procedures, the En Banc Majority of the Fifth Circuit Has Created a Constitutional Requirement Not Previously Recognized.

As the en banc dissenting judges observed, the case at bar is characterized by "the complete failure of the majority to confect some credible constitutional analysis for a violation of due process. . . . " App. 19 (Jolly, J., dissenting). "Failure to use proper constitutional analysis has led to the majority's conclusion that the LISD violated Coggin's procedural due process rights." App. 45 (Garza, J., dissenting).

In this case, the parties do not dispute that Coggin's termination deprived him of a protected property interest in continued employment, and thus he was entitled to constitutional due process in conjunction with the proposed termination of his employment. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). The determination that Coggin was entitled to due process, however, is only the first step of a proper constitutional analysis. The threshold question then becomes: What process constitutionally was due Coggin by the School District? The district court erred when answering that threshold question (which, in turn, led it improperly to reach and resolve

other unnecessary questions). The en banc majority erred in affirming the district court.

In the case at bar, the en banc majority follows a constitutional analysis that lacks both logic and precedent. According to the majority's analysis, the School District did *not* violate Coggin's constitutional procedural due process rights because it discharged him without a hearing. Instead, the majority holds that LISD violated Coggin's Fourteenth Amendment rights because it discharged him before time had expired for Coggin to seek judicial review of the Commissioner's decision.

Under the rationale of the Fifth Circuit, the opportunity for a judicial remedy now is a component of pre-termination due process. The en banc majority concludes that by failing to allow Coggin a 30-day period (prior to discharge) to seek judicial review of the Commissioner's decision, "LISD's discharge of Coggin . . . prematurely cut off Coggin's right to appeal" and thus violated his procedural due process rights. App. 9.

The holding of the en banc majority is unprecedented because it is cast as a *pre-termination* constitutional requirement. Although "[e]xhaustion of review procedures is not required" as a prerequisite to suit under 42 U.S.C. § 1983, *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 n. 13 (1985), according to the Fifth Circuit majority, the opportunity for exhaustion of review procedures now is a component of the pre-termination procedures that constitutionally are required prior to the discharge of a public employee.

The key to a procedural due process claim is whether the plaintiff was afforded the quantity of process to which

he constitutionally was entitled prior to the deprivation of a protected interest. In *Zinermon v. Burch,* the Supreme Court described the right to procedural due process as follows:

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. . . . The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

494 U.S. 113, 125-26 (1990) (internal citations and footnote omitted).

When providing constitutional due process, the State may erect reasonable procedural requirements and accords due process when it terminates a claim for failing to comply with those requirements. When discussing the constitutional process due an employee who is discharged, in *Logan v. Zimmerman Brush Co.* the Supreme Court issued the following caveat:

> Obviously nothing we have said entitles every civil litigant to a hearing on the merits of every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication. . . . And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. *Hammond Packing Co. v. State of Arkansas,*

> 212 U.S. at 351, 29 S.Ct. at 380; *Windsor v. McVeigh*, 93 U.S. at 278. What the Fourteenth Amendment does require, however, "is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case'. . . . "

455 U.S. 422, 437 (1982).

The required component of constitutional due process that is at issue in the case at bar is Coggin's opportunity for an evidentiary termination hearing. The required pre-termination 'opportunity for hearing,' however, does not also encompass the 'opportunity for judicial review' of any adverse decision prior to discharge.

In this case, there is no dispute that the Commissioner made a final decision when he refused to appoint a hearing examiner to hold the evidentiary hearing on Coggin's proposed termination. Nevertheless, by grafting the opportunity for judicial review of that decision onto the requirements of pre-termination procedural due process, the en banc majority impermissibly has overlapped the distinct concepts of (1) the required finality of a decision, and (2) the exhaustion of post-termination remedies and the availability of judicial review:

> The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. See *FTC v. Standard Oil Co.*, 449 U.S. 232, 243, 101 S.Ct. 488, 495, 66 L.Ed.2d 416 (1980); *Bethlehem Steel Corp. v. EPA*, 669 F.2d 903, 908 (CA3 1982). See generally, 13A C. Wright,

> A. Miller & E. Cooper, *Federal Practice and Procedure* § 3532.6 (1984). While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson County Regional Planning Com'n, 473 U.S. at 192-93.

When the Commissioner refused to provide an evidentiary termination hearing for Coggin, it was that decision which inflicted any final, "actual, concrete injury" under the Due Process Clause. *Id.* By focusing instead on Coggin's opportunity for judicial review of that decision, the en banc majority has expanded pre-termination due process requirements beyond all recognition and precedent.

Texas may have a 30-day period for a party to seek judicial review of an administrative decision, yet another State may have a similar period lasting one year or more. Must the governmental employer in such a State refrain from terminating an employee for a one year period as a constitutionally required pre-termination procedure (and continue to pay the employee in the meantime)? If the focus of the required pre-termination procedures is on the opportunity for judicial review, is the governmental employer required to refrain from terminating the employee as long as the opportunity for *further* judicial review exists in the appellate courts?

In essence, the en banc majority erroneously transforms a distinct and separate post-termination remedy (*i.e.*, the availability of judicial review procedures) into a pre-termination requirement. Any denial of an opportunity for judicial review, however, is a separate and independent claim from Coggin's pleadings and allegations that he was denied a constitutionally required opportunity for hearing prior to discharge.

By failing to use a proper constitutional analysis, the en banc majority has created a constitutional mandate never before recognized. The opportunity for hearing that is part of the Fourteenth Amendment's requirement of procedural due process does not encompass the opportunity to exhaust available state review procedures prior to discharge. Contrary to the constitutional analysis of the en banc majority, the opportunity for judicial review of a final administrative decision is not grafted onto the constitutional mandates of pre-termination due process. By holding otherwise, the court below has tacked a potentially open-ended period (derived from the separate issue of a judicial remedy) onto the procedures that must be undertaken before a public employee with a property interest may be discharged.

As the dissenting judges observed, in this case "Coggin failed to demonstrate a constitutional violation." App. 43 (Garza, J., dissenting). Not only did Coggin fail to show a constitutional violation, but by concluding that pre-termination procedural due process under the Fourteenth Amendment encompasses the separate post-termination remedy of an opportunity to exhaust available state review procedures, the en banc majority of the Fifth Circuit has created a constitutional requirement not previously recognized. The en banc majority turns the Due Process

Clause on its head by incorporating an opportunity for post-termination judicial remedies as part of the pre-termination procedures that were constitutionally due Coggin.

II. By Holding the School District Liable for Violating Coggin's Procedural Due Process Rights, the En Banc Majority of the Fifth Circuit Eviscerates the Causation Requirement under 42 U.S.C. § 1983 in a Case Involving Two Separate State Actors.

"This is, in essence, a causation case." App. 27 (Garza, J., dissenting). The language of 42 U.S.C. § 1983, itself, required Coggin to establish that the School District 'subjected him, or caused him to be subjected' to the deprivation of his procedural due process rights. However, a local governmental employer (like LISD) does not cause a violation of an employee's constitutional procedural due process rights under § 1983, when (1) state law parcels out different responsibilities to a state-level agency and to the local governmental employer in order to satisfy the requirements of pre-termination constitutional due process, and (2) the state-level agency fails to fulfill its mandatory and exclusive statutory duty to provide for the evidentiary termination hearing.

As the en banc majority observed, the constitutional issue presented by this case "involved two state actors," and thus raised the ultimate causation question of "who is the state actor responsible for the violation – the LISD or the Commissioner." App. 10. Further, it is a case in which Coggin expressly has acknowledged that (1) "[t]he ultimate decision to appoint (or not appoint) a hearing examiner rests

solely with the TEA" and (2) "[t]he TEA refused Coggin's request for a hearing."

In 1995, Texas abandoned the typical scheme in which the local governmental employer is charged with providing all constitutional process that is due in conjunction with the termination of an employee with a protected property interest in continued employment. The 1995 reforms to the Texas Education Code eliminated the former Code provisions which provided for "full-blown hearings before the board of trustees" and instead substituted the use of "independent fact finders who are certified hearing examiners" to provide the evidentiary hearing over a proposed discharge. Ellen Williams, *Annual Survey of Texas Law*, 49 SMU L. Rev. 901, 922-24 (1996). As noted by the dissenting judges:

> Once the Commissioner refused to appoint a hearing examiner, the LISD had no authority to order the Commissioner to change his mind or to appoint a certified hearing examiner on its own. *See* Tex. Educ. Code Ann. § 21.257. Because the actions of the LISD did not in any way cause the denial of Coggin's right to a hearing, the LISD cannot properly be said to have caused the deprivation of Coggin's right to procedural due process.

App. 31 (Garza, J., dissenting).

With the en banc majority's unprecedented decision that pre-termination constitutional due process required LISD to afford Coggin an opportunity for judicial review prior to discharge, the Fifth Circuit majority determined causation from whole cloth. As Judge Jolly observed in dissent:

> In short, the assumption of the majority that [Coggin's] termination *caused* the denial of due process by rendering his right to appeal moot is speculation of an unrestrained sort, which indeed seems contrary to reason and logic.
>
> I could agree with the majority opinion if *anywhere* in the record it were evident that [Coggin] had met his burden of proof to support the majority's new-found, unbriefed, unargued theory that his termination denied him an effective appeal of the Commissioner's decision. But there is *nothing* in the record – or the law – to support the majority's theory – and the majority apparently does not argue that there is. Such is the consequence of attempting to develop arguments never presented by anyone at any time in order to tailor an outcome for a favored party.

App. 18 (Jolly, J., dissenting) (emphasis in original).

The en banc majority contends that its "decision in no way subjects a school board to liability for acts other than its own." App. 14. However, by skirting any appropriate analysis of causation under § 1983, that is precisely the result of the majority's decision. To establish that the School District caused the violation of Coggin's procedural due process rights, the en banc majority concludes that "had the school board given Coggin the statutorily allotted time to appeal the Commissioner's decision, there would have been no denial of due process." App. 14.

That analysis of causation by the en banc majority fails for lack of the required "direct causal link" between the acts of the School District and the alleged constitutional deprivation. *City of Canton, Ohio v. Harris,* 489 U.S. 378, 385 (1989). Obviously, if one retreats far enough from

identifying which state actor was responsible for failing to provide Coggin an evidentiary termination hearing (*i.e.*, the process due), a tenuous connection always may be made to LISD. For example, Coggin never would have been denied due process by any state actor if the School District had not proposed Coggin's termination. The Supreme Court, however, has rejected such attenuated causal connections as supporting § 1983 liability. As the Court similarly stated when discussing the causation requirement of § 1983:

> Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any . . . harm inflicted by a municipal official; for example, [a police officer] would never have killed Tuttle if Oklahoma City did not have a 'policy' of establishing a police force. But *Monell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy."

City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985), *citing Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978).

The proper analysis of § 1983 causation in cases involving two or more state actors is of critical importance to the jurisprudence of the nation and has implications far beyond the statutory scheme for the termination of Texas teachers. The causation analysis of the en banc majority now will apply with equal force to other statutory schemes involving the separation of duties and responsibilities between two or more state actors. For example, the attenuated causation analysis of the en banc majority would

govern § 1983 cases in which duties and procedures are parceled out between civil service commissions and local governmental employers in conjunction with employee terminations. *See, e.g., Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1329-30 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000) ("Stimpson was employed as a police officer by the city of Tuscaloosa," yet under Alabama state law "the City of Tuscaloosa ha[d] no power to unilaterally fire a police officer" and such power instead was lodged exclusively in "a Civil Service Board of Tuscaloosa, whose members are appointed by the Governor of Alabama."). Likewise, the flawed causation analysis of the en banc majority now would govern cases seeking to determine the responsible state actor when duties and procedures are parceled out by state law between state-level and local prison officials to ensure that the constitutional rights of incarcerated inmates are not violated. *Bush v. Viterna,* 795 F.2d 1203 (5th Cir. 1986).

Rather than relying on a direct causal connection by which to hold the School District liable, the en banc majority's attenuated reliance upon a theory linking pre-termination procedures with post-termination judicial remedies fails to meet the standards of causation required by § 1983. As the dissent observed, in this case "because both Coggin and the majority have failed to carry their respective burdens of proof and persuasion, to explain *how* his termination in fact eviscerated his right to appeal, the question of causation remains unanswered. . . . " App. 19 (Jolly, J., dissenting).

With its improper analysis and erroneous holding that LISD caused a violation of Coggin's procedural due process rights in the case at bar, the en banc majority of the Fifth Circuit, in essence, eliminates the causation requirement

under 42 U.S.C. § 1983 in a case involving two separate state actors. Regardless of whether Coggin failed timely to file a request for hearing under the state procedures he concedes provide all process constitutionally due or whether the Commissioner erred as a matter of state law in interpreting the TEA filing requirements, any such dispute was not a dispute involving the School District and was not caused by LISD.

The en banc majority glosses over the requirement of causation and focuses instead on which state actor discharged Coggin, rather than which state actor "fail[ed] to provide due process." *Zinermon*, 494 U.S. at 125. Stated simply, a plaintiff's due process rights are not violated because his property is taken from him; his rights are violated because he was denied a certain amount of process before his property was taken. *See, e.g., Carey v. Piphus,* 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken and unjustified deprivation of life, liberty, or property."). Because the essence of a procedural due process claim is whether or not the plaintiff was afforded constitutionally adequate process, the majority's emphasis on who made the final decision to terminate Coggin is misplaced.

In short, contrary to the relevant decisions of this Court, the en banc majority erroneously analyzes a critical question of causation in a procedural due process case of widespread application. By failing to require a direct causal connection for liability to attach, the majority misidentifies LISD as the state actor responsible for any deprivation of Coggin's due process rights. As the en banc dissenting judges concluded, "[w]ithout the necessary causal link between Coggin's supposed due process violation and

the actions and/or duties of the LISD, Coggin cannot maintain a valid § 1983 claim against this defendant." App. 45 (Garza, J., dissenting).

III. The En Banc Majority of the Fifth Circuit Improperly Decided the Case on a New-Found Theory Not Raised, Briefed, or Argued by the Parties, Thus Denying The School District an Ability to Be Heard Even on Such Basic Issues as the Damages that Properly Could Be Awarded under the New Theory.

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff,* 428 U.S. 106, 120 (1976). As Justice Blackmun wrote on behalf of a unanimous Supreme Court, the rule that appellate courts not consider issues that the parties failed to present to the lower court:

> is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute.

Id., quoting Hormel v. Helvering, 312 U.S. 552, 556 (1941).

As observed by the dissenting en banc judges in this case, "[t]hroughout this litigation, the theory supporting LISD's liability for a constitutional violation has been marked by an inventive and evasive character whenever cornered by law or fact." App. 15 (Jolly, J., dissenting). The en banc majority "base[d] its opinion on a theory never raised by the parties in this case; namely, the theory that LISD fired Coggin too quickly and failed to give Coggin proper time to seek state court judicial review of the Commissioner's decision not to allow a hearing." App. 19 (Jones, J., dissenting). With its decision, the majority abandoned the theory of recovery and rationale relied upon by Coggin, the district court, and the Fifth Circuit panel, and "simply created an issue" never raised, briefed, or argued by the parties. App. 20 (Jones, J., dissenting).

This is a case in which Coggin selected his forum and opted not to seek judicial review of the Commissioner's decision in state court but to litigate in federal court instead. Once in federal court, Coggin then chose voluntarily to dismiss the Texas Education Agency and the Commissioner as parties to his lawsuit. Moreover, although they no longer were parties to the suit, in his amended pleadings Coggin thereafter continued to allege that TEA and the Commissioner had violated his constitutional right to procedural due process.

Coggin was represented by counsel, and Coggin's attorney chose his own strategies for resolving his disputes with the Commissioner and selecting the issues to raise against the School District. He voluntarily abandoned any claims against TEA and the Commissioner, and he failed to raise any issue that Coggin was denied due process because LISD acted "too quickly" thereby depriving

him of an ability to seek judicial review of the Commissioner's decision.

The fact that the School District was the only defendant left in the lawsuit does not justify the en banc majority's attempt to remedy any defects in Coggin's litigation strategy by imposing liability upon LISD. As the en banc dissenting judges observed, the majority in this case "would have been well served to follow the lead of the D.C. Circuit." App. 25 (Jones, J., dissenting).

> Of course not all legal arguments bearing upon the issue in question will always be identified by counsel, and we are not precluded from supplementing the contentions of counsel through our own deliberation and research. But where counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, "important questions of far-reaching significance" are involved.

Carducci v. Regan, 714 F.2d 171, 177 (D.C.Cir. 1983) (Scalia, J.), *quoting Alabama Power Co. v. Gorsuch,* 672 F.2d 1, 7 (D.C.Cir. 1982). As the dissent further observed:

> The case before us is of far-reaching significance for Texas's scheme for teacher discipline and terminations that was carefully crafted to enhance teachers' rights while ensuring a fast decisional track. The majority opinion casts constitutional doubt on the scheme despite Coggin's concession that the statutorily mandated process is constitutional.

App. 26 (Jones, J., dissenting).

The American system of judicial decisionmaking is grounded on the adversary process. *Vintson v. Anton,* 786

F.2d 1023, 1025 (11th Cir. 1986) (noting that the adversary system is what "characterizes the judicial process under the Anglo-American common law"). "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci,* 714 F.2d at 177. As Judge Posner has observed:

> This is a case in which the lawyer for a party tells the appellate court that he does not base his claim on grounds X and Y . . . , but the court's independent research and reflection persuade the court that the lawyer is wrong. If reversal on such grounds is proper, we no longer have an adversary system of justice in the federal courts.

Hartmann v. Prudential Ins. Co. of Am., 9 F.3d 1207, 1215 (7th Cir. 1993).

By abandoning any reliance upon the adversary system and the litigants to identify and develop the issues before the court, the en banc majority improperly deprived the School District an ability to be heard even on such basic issues as the damages that properly could be awarded under the majority's new theory. If a procedural due process violation allegedly caused by the School District had been premised in the district court upon a failure to allow Coggin a 30-day period to seek judicial review of the Commissioner's decision, then LISD would have pursued the evidence limiting Coggin's damages to that same 30-day period. Coggin failed to mitigate his damages during that 30-day period by even attempting to seek judicial review in state court of the Commissioner's decision. Thus, under the majority's new-found theory,

Coggin is entitled to no damage award or, in the alternative, nominal damages and attorneys' fees.

As the en banc dissenting judges concluded:

> Under the majority's opinion, LISD will lose its appeal based on an argument of which it had neither notice nor opportunity to respond. Receiving notice and being given the right to respond constitute the core of procedural due process. Therein lies the ultimate irony. The majority's opinion denies due process to LISD while simultaneously holding the school district liable for depriving Coggin of due process.

App. 27 (Jones, J., dissenting).

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Revised July 23, 2003

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-40731

RANDALL COGGIN,

Plaintiff-Appellee,

VERSUS

LONGVIEW INDEPENDENT SCHOOL DISTRICT; ET AL,

Defendants,

LONGVIEW INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas

(Filed July 2, 2003)

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS and CLEMENT, Circuit Judges.*

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* Judge Prado, who joined our court subsequent to en banc oral argument, did not participate in this decision.

JAMES L. DENNIS, Circuit Judge:

Randall Coggin brought this action under 42 U.S.C. § 1983 against his former employer, a Texas independent school district, because its board of trustees terminated his employment contract without any kind of a hearing. After a bench trial, the district court rendered judgment in favor of Coggin. A divided panel of our court affirmed.[1] A majority of the judges in active service voted to rehear the case en banc.[2] We now affirm the judgment of the district court.

I. Statutory Procedure for Termination of School Board Employees' Term Contracts

Under the Texas Education Code, a school board has the power to terminate a term contract and discharge a teacher at any time "for good cause as determined by the board."[3] Prior to terminating a term contract, however, the board must give the teacher notice of its proposed action.[4] If the teacher desires a pre-termination hearing under state law, he must file a written request with the state commissioner of education ("Commissioner") within 15 days of receiving notice of his proposed termination.[5]

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[1] *Coggin v. Longview Indep. Sch. Dist.*, 289 F.3d 326 (5th Cir.2002).

[2] *Coggin v. Longview Indep. Sch. Dist.*, 309 F.3d 307 (5th Cir.2002).

[3] Tex. Educ. Code Ann. § 21.211(a)(1) (Vernon 1996). Under Texas law, each independent school district is considered a municipal governmental entity, *id.* § 11.151, and is governed by a board of trustees (*i.e.*, a school board), *id.* § 11.051(a).

[4] *Id.* §§ 21.251(a)(1), 21.253.

[5] *Id.* § 21.253. The Commissioner is appointed by the governor with the advice and consent of the state senate, *id.* § 7.051, and heads the Texas Education Agency, *id.* §§ 7.002, 7.055.

Within 10 business days of receiving a timely request for a hearing, the Commissioner must assign a hearing examiner to conduct a hearing in that particular case.[6] Not later than 45 days after the Commissioner receives a request for a hearing, the hearing examiner shall complete the hearing and recommend findings of fact, conclusions of law, and, if appropriate, the granting of relief.[7] The school board, not the Commissioner, is taxed with the costs of the hearing examiner, the shorthand reporter, and the production of a hearing transcript.[8]

After receiving the examiner's recommendation and the record of the hearing, the school board or its designated subcommittee must consider them and allow each party to present an oral argument to the board or subcommittee.[9] Within 10 days of that meeting, the board must announce a decision that includes findings of fact and conclusions of law and that may include a grant of relief.[10] The board may adopt, reject, or change the hearing examiner's conclusions of law or proposal for granting relief, and it may reject or change the hearing examiner's finding of facts not supported by substantial evidence in the record.[11]

Section 7.057(d) of the Texas Education Code provides that "[a] person aggrieved by an action of the agency or

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[6] *Id.* § 21.254(c).

[7] *Id.* § 21.257.

[8] *Id.* § 21.255(e).

[9] *Id.* § 21.258.

[10] *Id.* § 21.259.

[11] *Id.*

decision of the Commissioner may appeal to a district court in Travis County."[12] This appeal must be made by serving the Commissioner as in a civil suit, and the court shall determine all issues of law and fact at trial.[13]

II. Factual and Procedural Background

Randall Coggin worked for the Longview Independent School District ("LISD") for more than 30 years. From 1983 until his discharge on September 13, 1999, Coggin supervised the LISD Career and Technology Education department. At the time of his discharge, Coggin was employed under a two-year term contract spanning the 1998-1999 and 1999-2000 academic years. Before receiving notice of his proposed termination, his performance appraisals were generally complimentary. On August 12, 1999, however, Coggin received a letter from the LISD's new superintendent notifying him that the school board proposed to terminate his employment contract for engaging in various alleged improprieties, including sexually harassing female subordinates, using LISD resources for his personal benefit, impeding the LISD's investigation of his behavior, and falsifying asbestos records. On August 24, Coggin deposited copies of his written request for a hearing with the U.S. Postal Service for delivery via certified mail, properly stamped and addressed to the Commissioner and the school board. The school board received its copy of Coggin's request on August 26, but the Commissioner did not receive the request until August 30.

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[12] *Id.* § 7.057(d)

[13] *Id.*

Because the Commissioner mistakenly thought that Coggin's request must have been *received,* rather than *filed,* by August 27, 1999, he refused to appoint a hearing examiner. On September 2, 1999, the Commissioner mailed copies of a letter addressed to both Coggin and the LISD's counsel stating that (1) the Commissioner had received Coggin's written request for the appointment of a hearing examiner; (2) the request was dated and postmarked before the August 27 deadline for filing; (3) the Commissioner received the request on the third day following the deadline; but (4) the Commissioner would not appoint a hearing examiner because Coggin's request was received after the deadline. After Coggin received the Commissioner's September 2 letter, Coggin's attorney and the Commissioner engaged in a "flurry of correspondence" regarding the timeliness of Coggin's request for a hearing, but the Commissioner declined to reconsider his refusal to appoint a hearing examiner.[14]

On September 13, 1999, the LISD school board, without giving further notice to Coggin or any kind of a hearing, adopted a resolution discharging Coggin as an employee of the LISD. The LISD concedes that it was aware of the Commissioner's refusal to appoint a hearing examiner prior to the board's action. Thus, as the district court found, "[w]hen it terminated Coggin's contract, the LISD board had actual knowledge that Coggin had requested a hearing on the termination of his contract, the

[14] District Court's Memorandum Opinion at 10.

date on which he had requested it, and that no hearing of any kind had been held."[15]

On November 12, 1999, Coggin brought suit against the LISD, the Texas Education Agency ("TEA"), and the Commissioner under 42 U.S.C. § 1983 for depriving him of his property without due process of law. After the district court expressed its opinion that the TEA and the Commissioner had a valid Eleventh Amendment defense, Coggin dismissed his § 1983 claim against them, and the case proceeded solely against the LISD. Following a bench trial, the district court concluded that (1) Coggin timely filed his request for a hearing as required by state law; (2) the board had notice that Coggin had not received a hearing despite his timely request; (3) the board deprived Coggin of his property without due process when it terminated his employment contract without any kind of a hearing; (4) the LISD failed to prove that Coggin had engaged in the alleged misconduct and therefore had no cause to terminate his employment contract; and (5) Coggin was entitled to $215,894 in damages and attorney's fees. The LISD appealed.

III. The LISD's Action Was the Sole Cause of The Violation of Coggin's Right to Due Process

On appeal the LISD does not dispute that its termination of Coggin's employment in the middle of his two-year term employment contract deprived him of a constitutionally protected property interest in continued employment, or that Coggin was entitled to constitutional due process

[15] *Id.* at 10-11.

in conjunction with the proposed termination of that employment.[16] Nor does it challenge or point to any error in the district court's determination that Coggin timely filed his request for a hearing.[17] LISD argues, instead, that any deprivation of Coggin's right to due process of law was caused by the Commissioner's refusal to appoint a hearing examiner, not by the school board's termination of his employment contract without a hearing: "The gravamen of this dispute is a question of causation."[18] Thus, the LISD contends that the Commissioner's action, to the exclusion of its own, should be considered the sole cause of the deprivation of due process and, therefore, that it is not responsible for the violation.

The LISD's irrevocable discharge of Coggin without a hearing just 4 business days after Coggin's receipt of the Commissioner's notice of refusal was the sole cause of the violation of Coggin's right to due process of law.[19] The LISD

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[16] Defendant's Supp. En Banc Brief at 15.

[17] Indeed, the LISD insists that the matter of the timeliness of Coggin's request for the appointment of a hearing examiner is irrelevant to its appeal:

> Regardless of whether Coggin failed timely to file a request for hearing under those procedures or the Commissioner erred as a matter of state law in interpreting the TEA filing requirements, any such dispute (1) was not a dispute involving the School District, (2) was not caused by LISD, and (3) was waived when Coggin failed to pursue appropriate relief in court against TEA and the Commissioner.

Id. at 22.

[18] *Id.* at 9.

[19] The Commissioner mailed his erroneous decision to Coggin and LISD on Thursday, September 2, 1999. Because of the intervening Labor Day on September 6, 1999 and the two days required for delivery

(Continued on following page)

argues that the Commissioner's erroneous refusal to appoint a hearing examiner was the cause of the violation because Coggin waived his rights by not appealing the Commissioner's decision through the filing of a civil suit in state district court as provided for by § 7.057(d) of the Texas Education Code. We disagree.

Section 7.057(d) does not prescribe a time limit within which a person aggrieved by an action of the Commissioner must file an appeal in the district court. The Texas Administrative Procedures Act, however, provides that an aggrieved person is allowed 30 days to appeal from the decision of an administrative agency.[20] Thus, Coggin was afforded 30 days by the Texas procedure to file his appeal in district court contesting the Commissioner's refusal to

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of other mail in this case, Coggin could not have received the Commissioner's September 2 letter until Tuesday, September 7, 1999. Therefore, the LISD discharged Coggin only 4 business days after he had received the Commissioner's September 2 letter.

[20] Tex. Gov't Code Ann. § 2001.176 (Vernon 2000) ("A person initiates judicial review in a contested case by filing a petition not later than the 30th day after the date on which the decision that is the subject of complaint is final and appealable."). A "contested case" means "a proceeding . . . in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." *Id.* § 2001.003(1). The Texas courts have construed this definition to include situations in which a state agency adjudicates a party's legal rights in an exercise of quasi-judicial authority, as opposed to making such an adjudication in an exercise of rule making authority. *See WBD Oil & Gas Co. v. Railroad Comm'n of Tex.*, 35 S.W.3d 34, 44 (Tex. App. 2001); *Ramirez v. Texas State Bd. of Med. Exam'rs.*, 927 S.W.2d 770, 772 (Tex. App. 1996); *Best & Co. v. Texas State Bd. of Plumbing Exam'rs.*, 927 S.W.2d 306, 309 & n.1 (Tex. App. 1996); *Big D Bamboo, Inc. v. Texas*, 567 S.W.2d 915, 918 (Tex. App. 1978).

assign a hearing examiner.[21] But the LISD's discharge of Coggin just 4 business days after his receipt of the Commissioner's notice of refusal prematurely cut off Coggin's right to appeal under § 7.057(d) and unreasonably foreclosed the possibility of a pre-termination due process hearing in his case.

Consequently, we conclude that Coggin did not waive his rights, and that the LISD's action of peremptorily discharging Coggin without a hearing just 4 business days after his receipt of the Commissioner's notice of refusal was the sole cause of the violation of his right to due process of law. The Commissioner's erroneous decision was not a cause of the violation because, if the LISD had not peremptorily discharged Coggin, that error could have been corrected on appeal by the state district court's order that the Commissioner assign a hearing examiner in accordance with the Texas Education Code procedure.

IV. The LISD Was the Responsible State Actor

This court's standard analysis for determining who is the state actor responsible for a constitutional violation in an action arising under § 1983 reaches the same result. In

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[21] Even if the Administrative Procedures Act did not apply, "Texas law is firmly established that, when the statute fails to prescribe such a time limit, an appeal must be taken within a reasonable time." *Westheimer I.S.D. v. Brockette*, 567 S.W.2d 780, 789-90 (Tex. 1978) (applying § 11.13(c), the predecessor to § 7.057(d), and citing *Railroad Comm'n v. Aluminum Co. of Am.*, 380 S.W.2d 599 (Tex. 1964); *Board of Water Eng'rs v. Colorado Mun. Water Dist.*, 254 S.W.2d 369 (Tex. 1953); *Midas Oil Co. v. Stanolind Oil & Gas Co.*, 179 S.W.2d 243 (Tex. 1944); and *Harkness v. Hutcherson*, 38 S.W. 1120 (Tex. 1897)).

Bush v. Viterna, we identified three key questions that guide our analysis of causes of action arising under § 1983:

> [T]he first question must be whether a federally secured right has been affected. . . . The second question that must be asked is whether the alleged deprivation of a federal right has been accomplished by state action. . . . After one has found a deprivation of a federally secured right and has determined that it resulted from state action, one must ask a third question: Who is the state actor responsible for this violation?[22]

In this case, because Coggin was deprived of his protected employment right without the due process hearing to which he was entitled and which he did not waive, and because that deprivation involved two state actors, the only question presented is who is the state actor responsible for the violation – the LISD or the Commissioner.[23] This inquiry depends on an analysis of state law.[24] That is, in order to identify the responsible state actor, we must

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[22] *Bush v. Viterna,* 795 F.2d 1203, 1209 (5th Cir.1986).

[23] *See McMillian v. Monroe County, Alabama,* 520 U.S. 781, 784-85 (1997) ("A court's task is to 'identify those officials or governmental bodies who speak with final policymaking authority for the local government actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.'" (quoting *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 737 (1989))).

[24] *Id.* at 786; *Jett,* 491 U.S. at 737 ("[W]hether a particular official has 'final policymaking authority' is a question of *state law*" (internal quotation omitted)); *Pembaur v. Cincinnati,* 475 U.S. 469, 483 (1986) ("[W]hether an official had final policy making authority is a question of state law."); *Bush,* 795 F.2d at 1209 (stating that the identify of the responsible state actor "will usually be answered exclusively by reference to state law and practice").

determine how state law distributes government functions.[25] But we do not *apply* state law; rather, we "simply [use] state law to identify the persons responsible for an identified civil rights violation."[26]

Texas law assigns to the school board, as the governing body of the school district, exclusive policy making authority with regard to employment decisions. The state law is clear that the school board, alone, may terminate a term contract and discharge an employee upon a finding of good cause.[27] Only the school board can determine whether such cause exists and whether an employee should be discharged as a result.[28] Under the explicit terms of the statute, then, the LISD was the final policy and decision maker with respect to Coggin's discharge.

By comparison, under Texas law the Commissioner is not vested with any final policymaking authority concerning either the determination of cause to discharge or the actual discharge of school district employees. The Commissioner's role of appointing a hearing examiner upon the timely filing of a request by an employee is ministerial and does not involve or require any policymaking. Consequently,

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[25] *McMillian,* 520 U.S. at 786 ("[O]ur understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law."); *Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 429 n.5 (1997) ("[The] federal question can be answered only after considering the provisions of state law that define the agency's character.").

[26] *Bush,* 795 F.2d at 1209.

[27] Tex. Educ. Code Ann. § 21.211(a)(1) ("The board of trustees may terminate term contract and discharge a teacher at any time for . . . good cause as determined by the board. . . .").

[28] *Id.* § 21.259.

there was no policy authored by the Commissioner that caused the particular constitutional violation at issue. In fact, there was no action taken by the Commissioner that deprived Coggin of his property without due process of law. The Commissioner has no authority to discharge a school district employee or to require the school board to terminate an employment contract. Indeed, the statute even requires that the school board, not the Commissioner, bear the costs of the hearing examiner, the shorthand reporter, and the production of a hearing transcript. In short, the Commissioner could not have been responsible for causing the termination of Coggin's employment contract for cause without a pre-termination hearing because he could not determine cause or discharge Coggin.

Consequently, because the school board was the final arbiter of employment disputes under Texas law, it was exclusively responsible for hearing Coggin's arguments against discharge before resolving the questions of cause and discharge.[29] Contrary to the LISD's arguments, Texas law has not removed or separated from the school board the function of providing pretermination due process to its employees.[30] Under well-established federal law, the

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[29] The Texas Supreme Court recognized this seminal fact in *Montgomery Independent School District v. Davis,* when it wrote in the context of a contract renewal case, "the Board retains the authority to make the ultimate decision of whether to renew a teacher's contract." 34 S.W.3d 559, 565 (Tex. 2000). Likewise, § 21.211(a)(1) makes clear that the board retains the exclusive authority to determine whether to terminate a teacher's contract for cause.

[30] The LISD, echoing the dissent to the panel opinion, asserts that Texas law separates the responsibility for providing a due process hearing from the responsibility for making termination decisions. The text of the Texas statutory scheme does not support this assertion. It is

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constitutional minimums for due process require that the final decision maker must hear and consider the employee's story before deciding whether to discharge the employee.[31] The purpose of this is self-evident. It is to provide a "meaningful opportunity to invoke the discretion of the decisionmaker . . . before the termination takes effect."[32] The Texas law complies with the federal due process requirement by providing that the school board, as the exclusive decision maker with regard to employment termination decisions, "shall allow each party to present

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true that under the statutory scheme the function of appointing a hearing examiner has been given to the Commissioner, Tex. Educ. Code Ann. § 21.254, and that the function of gathering evidence, making findings of facts, and recommending conclusions of law has been given to an appointed hearing examiner, *id.* § 21.257. But the school board retains the exclusive duty to "consider the recommendation and record of the hearing examiner" and "shall allow each party to present an oral argument" before rendering its decision on whether there is cause to terminate and whether to discharge an employee. *Id.* § 21.258. In reaching such a decision, the school board has authority to make its own conclusions of law, including the crucial determination of whether there is cause to discharge. *See id.* § 21.259(b) (The school board "may adopt, reject, or change the hearing examiner's . . . conclusions of law."). It "may reject or change a finding of fact made by the hearing examiner" that is not supported by "substantial evidence." *Id.* § 21.259(c).

[31] *See, e.g., Zinermon v. Burch,* 494 U.S. 113, 135 (1990) ("Because petitioners had state authority to deprive persons of liberty, the Constitution imposed on them the State's concomitant duty to see that no deprivation occur without adequate procedural protections.").

[32] *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 543 & n.8 (1985) (citing *Goss v. Lopez,* 419 U.S. 565, 583-84 (1975), and *Gagnon v. Scarpelli,* 411 U.S. 778, 784-86 (1973)). Both the employer and the employee benefit from this opportunity, for it ensures that the decision maker reaches an accurate decision. *Id.* It thus protects persons "not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus,* 435 U.S. 247, 259 (1978).

an oral argument to the board" before the board determines cause or discharges the employee.[33] Thus, under the responsible state actor analysis we conclude that the LISD is the state actor responsible for the violation in this case.

V. Answer to Amicus Argument

Contrary to the argument of the LISD's amicus, the Texas Association of School Boards Legal Assistance Fund, this decision in no way subjects a school board to liability for acts other than its own. If the Commissioner does not abide the prescribed scheme, Texas gives an aggrieved school employee the right to appeal to a state district court, thereby providing constitutional due process.[34] If the mandated procedure is followed, an employee will also have been afforded constitutional due process when a school board makes its final termination decision. When a school board disregards the statutory scheme, here depriving the employee of his right to appeal, however, it may subject itself to liability, not for the act of another but for its own act. To the point, had the school board given Coggin the statutorily allotted time to appeal the Commissioner's decision, there would have been no denial of due process.[35]

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[33] Tex. Educ. Code Ann. § 21.258(b); *see also Londoner v. Denver,* 210 U.S. 373, 386 (1908) ("[A] hearing in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."), *cited in Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 16 n.17 (1978).

[34] *See* Tex. Educ. Code Ann. § 7.057(d).

[35] Judge Jones mistakenly claims that the majority decides an issue that was not properly before the en banc court. Whether the LISD or the Commissioner caused the due process violation has been the

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VI. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

AFFIRMED.

E. GRADY JOLLY, Circuit Judge, joined by JONES, SMITH, BARKSDALE, EMILIO M. GARZA and CLEMENT, Circuit Judges, dissenting:

I could agree with the majority's theory of liability and outcome if its assumptions about the operation of state law had any basis in law or fact. Because those assumptions indisputably have no support, I cannot join the majority's opinion.

Throughout this litigation, the theory supporting LISD's liability for a constitutional violation has been marked by an inventive and evasive character whenever cornered by law or fact. The theory now expressed in the majority opinion for the first time, with no briefing from any party, is that Coggin was denied constitutional due process thus: LISD's termination of Coggin *caused* him to lose his statutory right to appeal the decision of the TEA Commissioner and thus caused a denial of procedural due process. If only that were true, I would join the majority.

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ultimate, concrete issue throughout the long history of this case. Accordingly, in answering the causation question, the opinion does nothing more than properly exercise the court's duty "to enunciate the law on the record facts." *See Empire Life Ins. Co. of America v. Valdak Corp.*, 468 F.2d 330, 334 (5th Cir. 1972); *see also Phillips v. Monroe County, Miss.*, 311 F.3d 369, 376 (5th Cir. 2002) ("We may affirm the district court's decision on any grounds supported by the record.").

The majority's opinion acknowledges that due process in this case is satisfied so long as Coggin had the right under state law to appeal the Commissioner's decision. "If the Commissioner does not abide the prescribed scheme, Texas gives an aggrieved school employee the right to appeal to a state district court, thereby providing constitutional due process." (Majority Op. at 15). "Section 7.057(d) of the Texas Education Code provides that '[a] person aggrieved by an action of the agency or decision of the Commissioner may appeal to a district court in Travis County.' This appeal must be made by serving the Commissioner as in a civil suit, and the court shall determine *all* issues of law and fact at trial." (Majority Op. at 4) (footnote omitted) (emphasis added).

However, the majority assumes that "[t]he LISD's irrevocable discharge of Coggin without a hearing just 4 business days after Coggin's receipt of the Commissioner's notice of refusal was the sole cause of the violation of Coggin's right to due process of law." (Majority Op. at 8). "[T]he LISD's discharge of Coggin just 4 business days after his receipt of the Commissioner's notice of refusal prematurely cut off Coggin's right to appeal under § 7.057(d). . . ." (Majority Op. at 9). "The Commissioner's erroneous decision was not a cause of the violation because, if the LISD had not peremptorily discharged Coggin, that error could have been corrected on appeal. . . ." (Majority Op. at 9). Thus, the majority concludes that "had the school board given Coggin the statutorily allotted time to appeal the Commissioner's decision, there would have been no denial of due process." (Majority Op. at 15).

Yet the majority fails to explain how the termination of Coggin denied him the right to appeal his case to the Travis County district court. It is of course plain that the

termination did not cause Coggin physically or procedurally to lose his right to appeal the Commission decision. The statute was still there, the district court in Travis County was still there, some 26 days – by the majority's calculation – remained in his appeal period, and Coggin still had free will. The majority seems to assume, without expressly saying so, that his termination made any appeal of the Commissioner's decision moot. Of course, neither the majority, nor I, nor any other judge on this court, nor any party, knows whether this assumption contains the slightest degree of correctness in fact or law. It is only an assumption tailored from whole cloth, for a specific fit. No brief has been filed raising the point. No argument is made by the majority that the statute supports such an assumption. No argument is made by the majority that case law supports any such assumption. The majority simply offers the theory as so many inspired words.

On the other hand, a more reasonable assumption would posit that had Coggin exercised his right to appeal – a right that no one has denied existed – a complete remedy would have been available. It is easily assumed that LISD would have been a proper party to that appeal. If on appeal the court had concluded that the Commissioner erred in rejecting Coggin's petition, it is a plausible assumption that the state court would have exercised its equitable powers and further would have held Coggin's termination a nullity under state law and ordered him reinstated pending the outcome of the TEA hearing, thus providing him a whole remedy ("the [Travis County district] court shall try *all* issues of law and fact . . . ." § 7.057 (emphasis added)). Assuming, however, the Travis County district court determined it had jurisdiction only to address

the error of the TEA Commissioner, another scenario is equally plausible, plainly demonstrating that whatever the status of his appeal might have been, it was not moot. If Coggin had exercised his right to appeal – a right, I repeat, no one denied existed – and if Coggin had chosen to appeal only the Commissioner's decision, he could have taken that judgment to the appropriate state court and obtained injunctive relief reinstating him pending the outcome of the TEA hearing he was denied. Both these scenarios are assumptions enjoying more reasonable speculative bases than the majority facilely adopts to support the conclusion necessary for the result it thinks is appropriate.

In short, the assumption of the majority that his termination *caused* the denial of due process by rendering his right to appeal moot is speculation of an unrestrained sort, which indeed seems contrary to reason and logic.

I could agree with the majority opinion if *anywhere* in the record it were evident that the plaintiff had met his burden of proof to support the majority's new-found, unbriefed, unargued theory that his termination denied him an effective appeal of the Commissioner's decision. But there is *nothing* in the record – or the law – to support the majority's theory – and the majority apparently does not argue that there is. Such is the consequence of attempting to develop arguments never presented by anyone at any time in order to tailor an outcome for a favored party.

I can appreciate the equities that drive the majority to try to fashion some relief in this case. During the pretermination process as provided by the Texas statute, Mr. Coggin got entangled in errors and alleged errors,

which he did not appeal. However, because both Coggin and the majority have failed to carry their respective burdens of proof and persuasion, to explain *how* his termination in fact eviscerated his right to appeal, the question of causation remains unanswered, I am unable to join in the opinion, and I respectfully dissent.[36] Finally, given what I regard as the complete failure of the majority to confect some credible constitutional analysis for a violation of due process, I join the dissents of Judges Jones and Garza.

EDITH H. JONES, Circuit Judge, joined by JOLLY, SMITH, BARKSDALE, EMILIO M. GARZA and CLEMENT, Circuit Judges, dissenting:

I fully concur in Judge Emilio Garza's excellent dissent. I am compelled by precedent, however, to comment on the majority's decision to base its opinion on a theory never raised by the parties in this case; namely, the theory that LISD fired Coggin too quickly and failed to give Coggin proper time to seek state court judicial review of the Commissioner's decision not to allow a hearing. *See* Judge Emilio Garza's Dissent at 7.

The problem has been colorfully, if hyperbolically, described by our brethren on the Seventh Circuit: "Judges are not like pigs, hunting for truffles buried in briefs."[37]

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[36] I do note that the majority opinion does not challenge or deny the correctness of a single assertion made in this dissent. The majority would thus seem to admit there is no record or legal support for its theory of liability, thereby calling into question not only footnote 35 of its opinion, but its entire opinion as well.

[37] "It is reasonable to assume that just as a district court is not required to 'scour the record looking for factual disputes,' it is not

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United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991). Today, the majority, unable to find a truffle in the briefs, has simply created an issue never raised by the parties either before the district court[38] or the panel of this court which first heard the case,[39] or in the supplemental briefs filed prior to en banc rehearing.[40] Like some of my former and current colleagues on this court, I find such behavior by an en banc court to demonstrate "a complete lack of appropriate judicial self-restraint." *United States v. Lyons,* 731 F.2d 243, 253 (5th Cir. 1984) (en banc) (Rubin and

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required to scour the party's various submissions to piece together appropriate arguments. A court need not make the lawyer's case." *Little v. Cox's Supermarkets,* 71 F.3d 637, 641 (7th Cir. 1995) (quoting *Waldridge v. Am. Hoechst Corp.,* 24 F.3d 918, 922 (7th Cir. 1994)) (internal citations omitted).

[38] The district court specifically noted that "[t]he parties have cited no law that allows for review of the Commissioner's failure to assign a hearing examiner." *Memorandum Opinion,* p. 17, Case No. 6:99-CV-658, (E.D. Tex. May 16, 2000). The district court further stated the parties did not raise or suggest the "relevance or applicability of Tex. Educ. Code Ann. § 7.057," upon which the majority relies. *Id.* at 17 n.14. Thus, the court refused to consider it. *Id.*

[39] None of the parties' original briefs even refers to Tex. Educ. Code Ann. § 7.057.

[40] LISD's en banc brief, in a footnote, refers to and quotes from Judge Emilio Garza's panel dissent in which he suggests that Coggin could have filed suit in state district court in Travis County against the Commissioner under § 7.057(d). But LISD makes no attempt to present a reasoned argument that this was relevant to, or determinative of, the present case. Accordingly, any such argument was abandoned for being inadequately briefed. *See* Fed. R. App. P. 28 (a)(5); *L&A Contracting Co. v. S. Concrete Servs., Inc.,* 17 F.3d 106, 113 (5th Cir. 1994); *Dardar v. Lafourche Realty Co.,* 985 F.2d 824, 831 (5th Cir. 1993). Moreover, a citation in LISD's brief, without more, could hardly furnish the basis for this court to grant relief to Coggin, who never even cited, much less argued, the provision.

Williams, JJ., concurring in part and dissenting in part, joined by Politz, Tate, and Higginbotham, JJ.).

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."[41] *Singleton v. Wulff,* 428 U.S. 106, 120 (1976); *Conley v. Bd. of Trs. of Grenada County Hosp.,* 707 F.2d 175, 178 (5th Cir. 1983) ("As a general principle of appellate review, we refuse to consider issues not raised below."). We deviate from this rule only in extraordinary circumstances. *Leverette,* 183 F.3d at 342. "Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it." *N. Alamo Water Supply Corp.,* 90 F.3d at 916. As this court has explained, such

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[41] "Although we can affirm a summary judgment on grounds not relied on by the district court, those grounds must at least have been proposed or asserted in that court by the movant." *Johnson v. Sawyer,* 120 F.3d 1307, 1316 (5th Cir. 1997); *see also Breaux v. Dilsaver,* 254 F.3d 533, 538 (5th Cir. 2001) ("Although this court may decide a case on any ground that was presented to the trial court, we are not required to do so."); *Leverette v. Louisville Ladder Co.,* 183 F.3d 339, 342 (5th Cir. 1999) ("This Court will not consider an issue that a party fails to raise in the district court absent extraordinary circumstances."); *Forbush v. J.C. Penney Co.,* 98 F.3d 817, 822 (5th Cir. 1996) ("Furthermore, the Court will not allow a party to raise an issue for the first time on appeal merely because a party believes that he might prevail if given the opportunity to try a case again on a different theory."); *N. Alamo Water Supply Corp. v. City of San Juan, Tex.,* 90 F.3d 910, 916 (5th Cir. 1996) ("We will not consider an issue that a party fails to raise in the district court, absent extraordinary circumstances."); *Mo. Pac. R.R. v. Harbison-Fischer Mfg. Co.,* 26 F.3d 531, 538 (5th Cir. 1994) ("[W]e can affirm the district court on the alternate grounds asserted below."); *FDIC v. Laguarta,* 939 F.2d 1231, 1240 (5th Cir. 1991) (refusing to affirm summary judgment on grounds "neither raised below . . . nor even raised sua sponte by the district court").

circumstances exist when "the asserted error is so obvious that the failure to consider it would result in a miscarriage of justice." *Conley,* 707 F.2d at 178. Given the closeness of this case, which is readily apparent from the split among the members of this court, one cannot say that the resolution of this newly raised argument is obvious.

The majority's decision to wander down the road they have chosen is particularly regrettable in light of the en banc court's nearly-unanimous statements of just five years ago in *United States v. Brace,* 145 F.3d 247 (5th Cir. 1998) (en banc). In light of the majority's dalliance, it is worthwhile to restate what this court said in *Brace:*

> It goes without saying that we are a court of review, not of original error. Restated, we review only those issues presented to us; we do not craft new issues or otherwise search for them in the record. *E.g., United States v. Johnson,* 718 F.2d 1317, 1325 n.23 (5th Cir. 1983) (en banc) (we will not review improper jury instruction if neither raised in trial court nor claimed on appeal to be error). It is for the parties, those who have a stake in the litigation, to decide which issues they want to pursue, at trial and on appeal. Diverse reasons underlie the choices the parties make. Likewise, other obvious factors come into play, such as judicial efficiency and economy, fairness to the courts and the parties, and the public interest in litigation coming to an end after the parties have had their fair day in court. *Cf. United States v. Atkinson,* 297 U.S. 157, 159, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936); *United States v. Olano,* 507 U.S. 725, 731, 113 S. Ct. 1770, 1776, 123 L. Ed. 2d 508 (1993); *United States v. Calverley,* 37 F.3d 160, 162 (5th Cir. 1994) (en banc), *cert. denied,* 513 U.S. 1196, 115

> S. Ct. 1266, 131 L. Ed. 2d 145 (1995). In short, it is not for us to decide which issues should be presented, or to otherwise try the case for the parties.
>
> Our role is indeed limited. Concerning our not acting as legislators, Justice Cardozo admonished that a judge "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness". Cardozo, *The Nature of the Judicial Process* 141 (1921). Needless to say, the same is true regarding our not addressing issues not presented to us.

Brace, 145 F.3d at 255-56. The same principle was endorsed unanimously by the en banc court earlier. *See Thomas v. Capital Sec. Servs., Inc.,* 836 F.2d 866, 884 n.25 (5th Cir. 1988) (en banc) ("As an appellate court, we decline to entertain issues not raised in, or decided by district courts."). The majority have failed even to cite, much less distinguish or otherwise explain their departure from en banc precedents. They advance no authority to support their novel approach to the judicial craft.

Further, as Justice Blackmun wrote on behalf of a unanimous Supreme Court, the rule that appellate courts not consider issues that the parties failed to present to the lower court:

> is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute,

> but this is only because petitioner has had no opportunity to proffer such evidence. *Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute.*

Singleton, 428 U.S. at 120 (quoting *Hormel v. Helvering,* 312 U.S. 552, 556 (1941)) (emphasis added).

The dangers of deciding issues raised by the court sua sponte are well-illustrated by the proceedings before the Eleventh Circuit in *Stewart v. Dugger,* 847 F.2d 1486 (11th Cir. 1988) (*Stewart I*), *vacated by* 877 F.2d 851 (11th Cir. 1989) (*Stewart II*). In *Stewart I,* a habeas petitioner brought a claim for relief based on allegedly inappropriate comments made during voir dire by the trial court in violation of *Caldwell v. Mississippi,* 472 U.S. 320 (1985). *Stewart I,* 847 F.2d at 1489. The court denied relief on these grounds. The court, however, did not stop there. The panel, in its subsequent opinion, characterized what happened next:

> While reviewing the *Caldwell* claim raised by Stewart and addressed above, this court noticed other occasions where defense counsel, the prosecutor and the trial judge touched on functions of the jury which might have been asserted as implicating *Caldwell* in a manner different from that which had been suggested by Stewart. The court sua sponte requested supplemental briefing and then addressed the merits of some, but not all, of these other, potential *Caldwell* issues. *See Stewart v. Dugger,* 847 F.2d 1486, 1489-1493. (11th Cir. 1988).

Stewart II, 877 F.2d at 854.

The court in *Stewart II* accordingly reconsidered its decision in *Stewart I* to address certain *Caldwell* issues sua sponte and upon reconsideration, struck that part of the discussion in *Stewart I*. *Id.* at 852 ("The court, sua sponte, reconsiders this case insofar as our previous opinion addressed an issue which had been raised by the court sua sponte and unadvisedly. For the reasons stated, one section of our previous opinion . . . is stricken and a statement of the reasons for its being stricken is inserted."). The court stated that it "unadvisedly" reached the issue because the *Caldwell* issues raised by the court were procedurally barred. *Stewart II,* 877 F.2d at 854-55. The court went on to note that the respondent, in its supplemental brief filed at the instruction of the court, pointed out that the petitioner's claim was procedurally barred. *Id.* at 855 n. 2. The court then admitted that "[h]aving raised these issues by our own motion perhaps led us to their resolution and caused us to overlook the procedural bar." *Id.*

Our sister circuit (as well as the majority in this case) would have been well served to follow the lead of the D.C. Circuit:

> Of course not all legal arguments bearing upon the issue in question will always be identified by counsel, and we are not precluded from supplementing the contentions of counsel through our own deliberation and research. But where counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, "important questions of far-reaching significance" are involved.

Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) (*quoting Alabama Power Co. v. Gorsuch,* 672

F.2d 1, 7 (D.C. Cir. 1982)). The case before us is of far-reaching significance for Texas's scheme for teacher discipline and terminations that was carefully crafted to enhance teachers' rights while ensuring a fast decisional track. The majority opinion casts constitutional doubt on the scheme despite Coggin's concession that the statutorily mandated process is constitutional.

The American system of judicial decisionmaking is grounded on the adversary process. *Vintson v. Anton,* 786 F.2d 1023, 1025 (11th Cir. 1986) (noting that the adversary system is what "characterizes the judicial process under the Anglo-American common law"). "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."[42] *Carducci,* 714 F.2d at 177. For this court to base its decision on grounds not raised by the parties is a "serious misadventure in the judicial process" and constitutes nothing less than the destruction of the cornerstone of the adversarial process. *Lyons,* 731 F.2d at 250 (Rubin and Williams, JJ. concurring

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[42] As Judge Phillips of the Fourth Circuit noted,

> [t]he most critical characteristic of the adversarial (as opposed to inquisitorial) system of litigation is the degree to which it gives over to parties acting through counsel a substantial degree of control over the litigation process. This control extends both to the formulation of the legal and factual issues to be laid before the court and to the presentation of factual proof and legal contentions on these issues to the decision maker.

Hirschkop v. Snead, 594 F.2d 356, 377 (4th Cir. 1979) (en banc) (Phillips, J., concurring).

in part and dissenting in part). Judge Posner has made the same point:

> This is a case in which the lawyer for a party *tells* the appellate court that he does *not* base his claim on grounds X and Y . . ., but the court's independent research and reflection persuade the court that the lawyer is wrong. If reversal on such grounds is proper, we no longer have an adversary system of justice in the federal courts.

Hartmann v. Prudential Ins. Co. of Am., 9 F.3d 1207, 1215 (7th Cir. 1993).

Under the majority's opinion, LISD will lose its appeal based on an argument of which it had neither notice nor opportunity to respond. Receiving notice and being given the right to respond constitute the core of procedural due process. Therein lies the ultimate irony. The majority's opinion denies due process to LISD while simultaneously holding the school district liable for depriving Coggin of due process.

I respectfully dissent.

EMILIO M. GARZA, Circuit Judge, joined by JOLLY, JONES, SMITH, BARKSDALE and CLEMENT, Circuit Judges, dissenting:

This is, in essence, a causation case. Specifically, we must address whether the LISD violated Coggin's procedural due process rights by terminating him without a hearing after the Commissioner determined that, under state law, Coggin had untimely filed his request for a hearing. Because I would find that the LISD did not violate Coggin's procedural due process rights, I respectfully dissent.

I

Section 1983 creates a cause of action against any person who, under color of law, "subjects, or causes to be subjected," a person "to the deprivation of [a constitutional right]."[43] In order to prevail on a § 1983 claim, this court has repeatedly held that it is not sufficient for a plaintiff to merely establish a violation of one of his constitutional rights. A plaintiff must also show a causal connection between the deprivation of that right and the actions of the defendant against whom relief is sought. *See, e.g., Neubauer v. City of McAllen,* 766 F.2d 1567, 1571 n. 11 (5th Cir. 1985) (reversing judgment against some of the defendants in a § 1983 action because plaintiff failed to show that they personally caused the deprivation of a constitutional right); *Irby v. Sullivan,* 737 F.2d 1418, 1425 (5th Cir. 1964) ("To be liable under section 1983, a [defendant] must be either personally involved in the acts causing the deprivation of a person's constitutional rights, or there must be a causal connection between an act of the [defendant] and the constitutional violations sought to be addressed."). This causation requirement applies with equal force in cases where a § 1983 action is premised on a

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[43] Specifically, the text of § 1983 reads:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

violation of procedural due process. *Reimer v. Smith,* 663 F.2d 1316, 1322 n. 4 (5th Cir. 1981) ("It is axiomatic that a plaintiff cannot succeed in a § 1983 action if he fails to demonstrate a causal connection between the state official's alleged wrongful action and his deprivation of life, liberty, or property.").

The panel opinion conceded (as the majority opinion now concedes) that Coggin needed to establish causation to prevail, but contended that he had met that burden because the LISD made the final decision to terminate him knowing he had not received a hearing. Thus, the panel opinion concluded, the LISD deprived Coggin of his property without due process of law. *Coggin v. Longview Indep. Sch. Dist.,* 289 F.3d 326, 336-38 (5th Cir. 2002). The problem with the panel opinion's analysis, however, is that it focused on the wrong causation issue. It based its causation analysis on who deprived Coggin of his *protected property interest,* when the real issue is who deprived Coggin of his *procedural due process right.*

Careful consideration of the right to procedural due process reveals the heart of a due process violation. Procedural due process does not protect one from the deprivation of life, liberty or property, but rather "from the *mistaken or unjustified* deprivation of life, liberty, or property." *Carey v. Piphus,* 435 U.S. 247, 259 (1978) (emphasis added). In other words, the key to a procedural due process claim is whether the plaintiff was afforded the quantity of process to which he was constitutionally entitled prior to the deprivation of a protected interest. In *Zinermon v. Burch,* the Supreme Court described the right to procedural due process as follows:

> The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure. . . . In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.* . . . The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

494 U.S. 113, 125-126 (1990) (internal citations and footnote omitted); *see also Brewer v. Chauvin,* 938 F.2d 860, 864 (8th Cir. 1991) ("The complained-of constitutional violation is the denial of procedural due process, not the plaintiff's discharge from public employment."). Stated simply, a plaintiff's due process rights are not violated because his property was taken from him; his rights are violated because he was denied a certain amount of process before his property was taken. Because the essence of a procedural due process claim is whether or not the plaintiff was afforded constitutionally adequate process, the majority opinion's emphasis on who made the final decision to terminate Coggin is misplaced.

To determine whether the LISD caused the deprivation of Coggin's procedural due process right in this case, we must ask whether the LISD caused Coggin not to have a due process hearing. Based on the record in this case, the answer to this question is no. Under § 21.253 and § 21.254 of the Texas Education Code, the sole authority to

appoint a state certified hearing examiner was vested in the Commissioner of the TEA. In this case, the Commissioner denied Coggin a hearing because, based on his interpretation of § 21.253, Coggin's request for a hearing was untimely. Even if one assumes that Coggin's rights were violated by the Commissioner's action, it was this mistake that caused Coggin to be denied a hearing and thus deprived him of his right to procedural due process. In contrast, the LISD did nothing to prevent Coggin from obtaining a pre-termination hearing. The LISD properly provided Coggin with notice of its intent to terminate his employment and of the measures he needed to take in order to preserve his right to a hearing. *See* TEX. EDUC. CODE ANN. § 21.251(a)(1). Once the Commissioner refused to appoint a hearing examiner, the LISD had no authority to order the Commissioner to change his mind or to appoint a certified hearing examiner on its own. *See* TEX. EDUC. CODE ANN. § 21.257. Because the actions of the LISD did not in any way cause the denial of Coggin's right to a hearing, the LISD cannot properly be said to have caused the deprivation of Coggin's right to procedural due process.

For the purposes of § 1983 liability, it is immaterial whether the LISD had other options available to afford Coggin due process after the Commissioner refused to appoint a hearing examiner. Although it is conceivable that the LISD could have held its own due process hearing[44] or sent a second notice of termination in an effort to

[44] The majority opinion suggests that Texas law does not prohibit the LISD from holding its own hearing. Maj. Op. at 14. This conclusion is dubious. The Texas Supreme Court has held that a school district may not avoid the rules set forth in the Texas Education Code for terminating an employee. *Montgomery Indep. Sch. Dist. v. Davis*, 34

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extend the period of time in which Coggin could file a timely request for a hearing, any possible "inaction" by the LISD cannot fairly be termed a "cause" of the potential constitutional violation at issue here.

An "inaction" view of causation misstates the LISD's obligation to Coggin in this situation. Under the statutory setting of this case, Texas law deliberately separates the decision to terminate a public school teacher from the duty to afford a due process hearing, presumably as a means of protecting teachers from biased school board reviews.[45]

S.W.3d 559, 568 (Tex. 2000) (concluding that "the Board did not have authority within the statutory scheme of subchapter F" to make additional findings beyond those made by the appointed hearing examiner); *see also* TEX. EDUC. CODE ANN. § 21.251 ("[Subchapter F] applies if a teacher requests a hearing after receiving notice of the proposed decision to: . . . (2) terminate the teacher's probationary or term contract before the end of the contract period. . . ."). Although *Davis* did not consider the due process aspects of the statutory scheme, it certainly illustrates the mandatory nature of the regime. The Education Code does not clearly authorize a school district to hold *any* type of hearing once the Commissioner declines to appoint a hearing examiner, and *Davis* at least suggests strongly that the LISD is forbidden from stepping beyond the narrow dictates of the scheme. *See also Reyes v. Roma Indep. Sch. Dist.*, No. 083-R2-199, at 4-6 (Tex. Comm'r Educ. Feb. 25, 2000) (stating that the procedures set out in Chapter 21 are mandatory and exclusive, that a board of trustees does not have jurisdiction to deviate from those procedures, and that the parties cannot agree to change those procedures unless the statute authorizes them to do so).

[45] The apparent purpose of this scheme is to ensure teachers a fair and independent review of the allegations against them when faced with termination prior to the expiration of their contracts. Under Texas law, Coggin could be terminated only for "good cause *as determined by the board.*" *See* TEX. EDUC. CODE ANN. § 21.211(a)(1) (emphasis added). By providing for an independent pre-termination hearing, however, Texas law limits the circumstances in which a school board may find "good cause" for termination. Although the school board may reject the

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The LISD had no authority to appoint a hearing examiner under this statutory scheme, nor did it have the authority to supplement Coggin's statutorily-governed hearing with its own factfinding hearing. *See Davis,* 34 S.W.3d at 568. Under Texas law, the LISD's role in providing Coggin procedural due process was complete when it provided him with constitutionally adequate notice of the charges against him and informed him of the procedures he needed to follow to request a pre-termination hearing from the Commissioner of the TEA. Once the LISD fulfilled this obligation, under Texas law, the duty to ensure that Coggin was afforded the hearing to which he was constitutionally entitled shifted to the Commissioner.[46] The majority opinion does not hold that this shift in obligations is unconstitutional. Indeed, it cannot, because no case holds that it is unconstitutional for Texas to "divide" due process in this way. *Cf. Bush v. Viterna,* 795 F.2d 1203, 1209 (5th Cir. 1986) ("The states have virtually complete freedom to decide who will be responsible for [the tasks of modern government], and therewith to determine who will be held liable for civil rights violations that occur in the course of carrying them out."). Instead, the majority opinion chooses

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conclusions of law and proposed action recommended by the appointed hearing examiner in an employee's case, the school board may not reject the hearing examiner's findings of fact if they are supported by the substantial evidence in the record. *See* TEX. EDUC.CODE ANN. § 21.259.

[46] Normally, the party who causes the deprivation of property is the party responsible for affording due process. Indeed, had this case arisen before the Texas legislature amended the Texas Education Code in 1995, there would be no question that the LISD could be held liable under § 1983 for terminating Coggin without a hearing. In 1995, however, the Texas legislature dramatically altered the state's provisions for terminating teachers under contract, and thereby changed this result.

to ignore this issue, limiting its analysis to the tangential issue of whether the LISD is the "final arbiter of employment disputes."[47] Maj. Op. at 13.

Thus, the only way that Coggin could succeed against the LISD in this case is if we invalidate Subchapter F's hearing provisions. But Coggin does not challenge the constitutionality of Texas's statutory scheme, either on its face or as applied in his case. On the contrary, he concedes that the procedures set forth in Subchapter F of the Texas Education Code are precisely the kind of "reasonable procedural requirements" for invoking due process rights previously sanctioned by the Supreme Court.[48] *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). Because Coggin argues only that the LISD violated his procedural due process right by terminating him after *the*

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[47] The "final decision maker" analysis in the original panel opinion concluded with the argument that the LISD was required to conduct a "due process hearing to comply with its federal constitutional obligations," and that any obstacle created by Texas law would "have to yield to federal law under the Supremacy Clause." *Coggin*, 289 F.3d at 336.

In actuality, the Supremacy Clause is irrelevant. It might be tempting to reason that if *state procedures* prevented the LISD from remedying the "mistake of law" made by the Commissioner, then those procedures should yield to federal law. This argument, however, assumes that the LISD retained an obligation to ensure that Coggin receive all the process he was due prior to terminating his employment. As noted above, Texas law vests that obligation in the Commissioner of the TEA – not the school district. Moreover, there is no legal support for the proposition that LISD had a *federal* obligation to compensate for the Commissioner's alleged mistakes. *Cf. Bush*, 795 F.2d at 1209.

[48] Coggin does argue, however, that the Commissioner improperly adopted a receipt rule instead of the more "traditional" mailbox rule, which has led to mischief at both the trial and appellate levels.

Commissioner wrongfully denied him a hearing, his claim fails for lack of causation.

II

The majority opinion has taken a different tack from that of the panel opinion. The majority opinion contends that the LISD was the "sole cause of the violation of Coggin's right to due process of law" because it discharged Coggin four business days after Coggin received notice of the Commissioner's refusal to appoint a hearing examiner. Maj. Op. at 8. The logic of this "timing" causation argument fails on its own terms, *see* Parts II.A and B *infra,* but the majority opinion's approach is suspect for at least two other reasons.

First, this new causation theory was never briefed or argued to either this court or the district court. In the panel opinion, the majority concluded that the LISD had violated Coggin's due process rights by firing him when it knew he had requested a hearing but had not received one. *Coggin,* 289 F.3d at 335-38. The majority opinion now contends, without any prompting by the parties, that the LISD's error was acting too quickly. This latter theory was not in any of the briefs submitted to the district court, nor was it included in the district court's ruling. It is inappropriate for the majority opinion to decide this case on grounds that were not presented. *United States v. Brace,* 145 F.3d 247, 255-56 (5th Cir. 1998) (en banc) ("Restated, we review *only* those issues presented to us; we do not craft new issues or otherwise search for them in the record." (emphasis added)).

Second, the majority opinion states that the LISD's discharge of Coggin "prematurely cut off Coggin's right to

appeal under § 7.057(d)." Maj. Op. at 9. Yet it cites no state law to support this argument. In fact, the majority opinion's underlying premise that TEX. EDUC. CODE ANN. § 7.057(d) somehow incorporates TEX. GOV'T CODE ANN. § 2001.176 is pure speculation about Texas law. Even if Coggin had a reasonable period of time to file an appeal, as the majority opinion contends (*see* Maj. Op. at 9 n.21), its further conclusion that Coggin did not have any appeal rights after the LISD terminated him is simply not supported by existing authorities. *See, e.g., Smithville Indep. Sch. Dist. v. Hoskins,* Nos. 03-98-00561-CV, 03-98-00624-CV, 1999 WL 716665 (Tex. App. – Austin Sept.16, 1999, no pet.) (not designated for publication) (considering a teacher's § 7.057(d) appeal after he had been terminated by the school board and affirmatively deciding that the court had jurisdiction to consider the issues raised by the teacher, including various due process claims).

A

The majority opinion reasons as follows: First, Coggin had a protected property interest in continued employment and was entitled to constitutional due process before his employment was terminated. Second, Coggin attempted to invoke his right to due process by requesting a pre-termination hearing from the Commissioner. Third, the Commissioner erroneously deprived Coggin of his right to a pre-termination hearing by ruling that Coggin's request was untimely. Fourth, the Commissioner's error could have been corrected by the Texas state courts, but the LISD cut off Coggin's appeals rights by firing him too

quickly.[49] Thus, the LISD is the "true" reason that Coggin was not provided with the pre-termination hearing to which he was entitled.

Of course, the third step of the majority opinion's reasoning is the linchpin to its analysis. Although the nature of Coggin's employment created due process rights, such rights can be waived. The Supreme Court has held that a state may both create reasonable procedural requirements regarding the right to a hearing and terminate a claim for failure to meet these statutory requirements without raising due process concerns. *Logan,* 455 U.S. at 437. In other words, Coggin was not entitled to a pre-termination hearing unless he complied with the reasonable procedural requirements of Chapter 21 of the Texas Education Code.[50] And one of those requirements is that a "teacher *must* file a written request for a hearing . . . with the commissioner *not later* than the 15th day after the date the teacher receives written notice [of the proposed termination]." TEX. EDUC. CODE § 21.253 (emphasis added).

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[49] The majority opinion's recitation of the facts also suggests that the LISD terminated Coggin in the face of a " 'flurry of correspondence' " between Coggin's attorney that the Commissioner regarding the timeliness of Coggin's hearing request. Maj. Op. at 5. In fact, the record clearly indicates that the flurry did not even begin until eleven days after Coggin's termination. So, there is no reason to believe that the LISD knew or had reason to know that Coggin was challenging the Commissioner's determination.

[50] This fact is undisputed. Again, Coggin himself admits that the procedures set forth in Subchapter F of the Texas Education Code are precisely the kind of "reasonable procedural requirements" sanctioned by the Supreme Court in *Logan.*

The Commissioner refused to appoint a hearing examiner because he determined that Coggin's request was late, and thus Coggin had waived his right to such a hearing. If the Commissioner was correct – that the mailbox rule does not apply under state law – then Coggin was not constitutionally entitled to a hearing or any other kind of process before the LISD terminated him. *See Logan,* 455 U.S. at 437. Accordingly, if Coggin waived his rights, then it is irrelevant whether the LISD fired him one day later, or one year later.

When phrased this way, it is clear that the majority's opinion rests on one fundamental premise: Section 21.253 of the Texas Education Code sets out a "mailbox rule" for hearing requests, and thus the Commissioner was *wrong* to apply a "receipt rule" to Coggin's request. The validity of Coggin's § 1983 suit depends on this premise. Coggin cannot establish that his due process rights were violated unless he can show that he did not waive those rights. Surprisingly, the majority opinion does not focus on the burden of proof in this case. But it is undisputable that Coggin bears the burden of showing that a constitutional violation occurred. *See Crawford-El v. Britton,* 523 U.S. 574, 588 (1998) (reiterating that the plaintiff bears the "initial burden of proving a constitutional violation"); *Lewis v. Woods,* 848 F.2d 649, 652 (5th Cir. 1988) ("It is axiomatic that a plaintiff who files suit under 42 U.S.C. § 1983 may recover only if he proves a constitutional violation. . . .").

The original panel opinion and the district court's ruling at least implicitly recognized this, and included an

explicit discussion on the rule of § 21.253. *Coggin,* 289 F.3d at 330-32. Although the detailed reasoning of those opinions is not included in the majority's opinion,[51] the waiver issue must still be considered because it is the necessary platform for the majority opinion's current holding. A careful examination reveals that this platform is faulty.

B

The majority opinion, like that of the original panel (and the district court), fails to recognize that § 21.253 of the Texas Education Code is ambiguous. Instead, all are content to believe that § 21.253 clearly applies a "mailbox rule" to hearing requests. However, § 21.253 does not say, on its face, that a filing is deemed timely if it was postmarked within the fifteen-day period. Likewise, § 21.253 does not explicitly state that hearing requests are governed by a receipt rule. Notwithstanding the majority opinion's assumptions to the contrary, § 21.253 is anything but clear.[52] In fact, Coggin himself knew of § 21.253's

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[51] The majority does, however, implicitly recognize the importance of this point. *See* Maj. Op. at 9 ("Consequently, we conclude that Coggin did not waive his rights. . . ."), 10 ("In this case, . . . Coggin was deprived of his protected employment right without the due process hearing to which he was entitled and which he did not waive . . .").

[52] This ambiguity can best be illustrated by examining the position taken by the district court. The district court first reasoned that "file" must not mean "receipt by the commissioner" because other provisions of the Texas Education Code explicitly use "receipt" language. Yet this argument is overly broad. Chapter 21 of the Texas Education Code uses "receive" to refer to a party's receipt of a document. Upon receipt, the party is given a certain amount of time to perform a designated action. In other words, the party is required to "file", "request", "notify", *et cetera* within so many days after "receiving" some type of notice. *See, e.g.,* TEX. EDUC. CODE ANN. § 21.207 (after "*receiving* notice of the

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ambiguity. He admits that he checked with the post office to see if his request, sent by certified mail, with return

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proposed nonrenewal," the teacher "shall *notify* the board of trustees . . . not later than the 15th day after the date the teacher *receives* the notice") (emphasis added); TEX. EDUC. CODE ANN. § 21.254(c) ("The commissioner shall *assign* a hearing examiner . . . not later than the 10th business day after the date on which the commissioner *receives* the request for a hearing.") (emphasis added). Viewed this way, it is clear that the Code's use of "receive" may be nothing more than a logical way to reference the start of a time period. This syntax does not, however, illuminate the meaning of "file" in § 21.253.

The district court also pointed out that the TEA's own administrative regulations incorporate a mailbox rule, *see* TEX. ADMIN. CODE ANN. § 157.1050(b), and took this as evidence of a general "view of the agency" that the mailbox rule governs hearings. But a general, catch-all provision in a different state code may not trump the detailed provisions set forth in chapter 21 of the Education Code. Evidence from within the same statutory scheme is more indicative of what the Texas legislature intended. *See, e.g., Horizon/CMS Healthcare Corp. v. Auld,* 34 S.W.3d 887, 901 (Tex. 2000) (holding that "the more specific statute controls over the more general"); *Rudman v. R.R. Comm'n of Tex.,* 349 S.W.2d 717, (Tex. 1961) ("Courts must take statutes as they find them."); *Gov't Pers. Mut. Life Ins. Co. v. Wear,* 251 S.W.2d 525, 529 (Tex. 1952) (holding that duty of courts is to construe a statute from the language used therein if possible). And a careful examination of chapter 21 reveals that the legislature deliberately included a mailbox rule in other sections. *See* TEX. EDUC. CODE ANN. §§ 21.105(a), .160, .210. Section 21.253 includes no such language, and this fact weighs against a mailbox rule.

Finally, the district court relied on *Ward v. Charter Oak Fire Ins. Co.*, 579 S.W.2d 909 (Tex. 1979). While the similarities between *Ward* and this case are striking, its importance is probably exaggerated. Decided almost twenty-five years ago, *Ward* involved the worker's compensation law, which the Texas Supreme Court held was "to be liberally construed to effectuate the remedies it grants." *Id.* at 910. Liberal construction of the Worker's Compensation Law was an established policy even before *Ward,* but no legal authority indicates that Texas liberally construes the statutory scheme at issue here.

receipt requested, would arrive by the deadline. So Coggin, by his own admission, was not relying on a mailbox rule.[53]

In the face of this obvious ambiguity, the Commissioner could have reasonably interpreted the statutory language to include either a mailbox rule or a receipt rule. The Commissioner chose the latter. And, had the Commissioner's interpretation been challenged in a Texas court, it would have been given "serious consideration, so long as the construction [was] reasonable and [did] not contradict the plain language of the statute." *Dodd v. Meno,* 870 S.W.2d 4, 7 (Tex. 1994) (quoting *Tarrant Appraisal Dist. v. Moore,* 845 S.W.2d 820, 823 (Tex. 1993)). The district court, however, erred by not according the Commissioner this deference. It failed to even consider the constitutionality of the receipt rule applied by the Commissioner.

This failure was a serious analytical error. In its haste to determine whether a constitutional violation had occurred, the district court did not stop to consider whether the receipt rule had afforded Coggin due process. Without a constitutional violation, Coggin does not have a claim under § 1983. Thus, the pertinent query for the district court was whether the Commissioner's reasonable application of a receipt rule provided Coggin with the necessary process. I agree with the majority opinion (and

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[53] If § 21.253 did clearly incorporate a mailbox rule, Coggin would have a much stronger constitutional claim. In that case, he could argue that it would be arbitrary, and therefore unconstitutional, for the Commissioner to deny Coggin's request for a hearing as untimely. *Cf. Logan,* 455 U.S. at 431-34 (finding a due process claim when the plaintiff was denied a hearing after complying with every state law procedural requirement). This is not, however, the situation before us.

the district court) that a fifteen-day mailbox rule satisfies due process. Importantly, however, a fifteen-day receipt rule is equally constitutional.

The constitutional minima of procedural due process are notice and a *meaningful opportunity* to respond. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 546 (1985); *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976). Against this constitutional background, it is clear that a fifteen-day receipt rule is as reasonable a procedural requirement as a fifteen-day mailbox rule; both provide a meaningful opportunity for a hearing. In fact, other courts have found significantly shorter time periods constitutional. *See Lindsey v. Normet,* 405 U.S. 56, 64-65 (1972) (finding an eviction procedure with a two to six day early-trial provision constitutional); *Panozzo v. Rhoads,* 905 F.2d 135, 139 (7th Cir. 1990) (affirming a district court's ruling that notice of a pre-termination hearing less than a day in advance is sufficient for due process purposes); *see also Giberson v. Quinn,* 445 A.2d 1007, 1009-10 (Me. 1982) (considering a ten-day time limit with a receipt rule for filing a request for a hearing following the suspension of a driver's license).

The simple fact is that the district court did not need to determine state law to evaluate Coggin's § 1983 suit: the Commissioner's application of a receipt rule did not violate Coggin's due process rights.[54] Since the Commissioner

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[54] Even if the Texas courts someday decide that § 21.253 incorporates a mailbox rule, the Commissioner's failure to afford Coggin that extra increment of procedural protection would not automatically become unconstitutional. At the time Coggin was denied a hearing, the Commissioner's reasonable interpretation and application of § 21.253

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applied a reasonable construction of a facially ambiguous statute, Coggin cannot seriously argue that his denial of a hearing was arbitrary. *Cf. Neal v. Puckett,* 286 F.3d 230, 249 (5th Cir. 2002) (en banc) (Jolly, J., concurring) (defining "arbitrary" to mean "determined by individual discretion"), *cert. denied,* 123 S.Ct. 963 (2003); *Reid v. Rolling Fork Pub. Util. Dist.,* 979 F.2d 1084, 1088 (5th Cir. 1992) (holding that "arbitrary" means *unreasonable* action or discrimination (emphasis added)). Thus, the opportunity afforded Coggin could only fail to be meaningful if it fell short of the constitutional minima – but it is the United States Constitution that determines the process Coggin was due, not the filing rule of § 21.253 of the Texas Education Code. And, as explained above, the rule applied by the Commissioner more than suffices when measured by a federal constitutional yardstick.[55]

The district court's unnecessary foray into state law obscures the plain fact that Coggin failed to demonstrate a constitutional violation.[56] For the reasons given above,

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was enough to accord Coggin due process. *Loudermill,* 470 U.S. at 546; *Lindsey,* 405 U.S. at 64-65.

[55] To be clear, because the receipt rule is constitutionally adequate, this court should not attempt to resolve the meaning of the term "file" in § 21.253. Likewise, the district court should have left this issue, a matter of state law, for Texas to decide.

[56] And the majority opinion seems to build on this error. It skims over this issue by insisting that the LISD "does not challenge or point to any error in the district court's determination that Coggin timely filed his request for a hearing." Maj. Op. at 7. This is simply not true. The LISD argued, before both the original panel and the *en banc* court, that Coggin was provided with the process he was due under the Fourteenth Amendment and, likewise, that the district court erred in its analysis of what process Coggin was due. *See, e.g.,* Appellant's Br. at 18, 24; Appellant's Supplemental En Banc Br. at 15-16. The LISD also argues

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Coggin cannot prove that the Commissioner's reasonable application of a receipt rule to his hearing request wrongly denied him a hearing. Accordingly, Coggin cannot show that he was unfairly denied a hearing; he cannot show that he did not waive his rights; and, therefore, he cannot prove that the LISD violated his due process rights by firing him immediately.[57]

The majority opinion attempts to shore up this faulty analysis by attaching various labels to the LISD, such as "responsible state actor," "final policy and decision maker," and "final arbiter of employment disputes." Maj. Op. at 12, 13, 14. These terms are reminiscent of the analysis in the original panel opinion. Again, the panel majority concluded that the LISD violated Coggin's due process rights because its "intentional discharge of Coggin in spite of its knowledge that he had not had any kind of hearing

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that this error, in turn, led the district court to "improperly . . . reach and resolve other unnecessary questions." Appellant's Br. at 24.

The LISD may not explicitly challenge the district court's holding that § 21.253 incorporates a mailbox rule, but it clearly argued that the district court did not need to decide this issue because the rule of *Logan* applied. *See id.* at 18. Because we review the district court's legal determinations *de novo*, the LISD's arguments are more than sufficient to preserve the issue of whether it was legally necessary, under federal constitutional law, for the district court to interpret § 21.253.

[57] Coggin's ultimate failure to demonstrate a constitutional violation by the LISD distinguishes this case from *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, the terminated school district employees had made the necessary showing that their rights were violated when they were fired without a pre-termination hearing. *Id.* at 548. Unlike Coggin, the *Loudermill* employees were given no opportunity to request a pre-termination hearing. *Id.* at 536-37. Thus, the issue of whether the employees had waived their rights was inapplicable.

necessarily was the moving force behind Mr. Coggin's deprivation and injury." *Coggin*, 289 F.3d at 336. But this line of reasoning is also faulty for the reasons given above. See Part I *supra*.

Assuming, *arguendo*, that Coggin could somehow prove that § 21.253 clearly incorporated a mailbox rule and thus he did not waive his right to a hearing, he still cannot succeed in this suit. No matter what process Coggin was owed, he has failed to establish that the LISD caused the deprivation of his rights. Without the necessary causal link between Coggin's supposed due process violation and the actions and/or duties of the LISD, Coggin cannot maintain a valid § 1983 claim against this defendant.

III

Failure to use proper constitutional analysis has led to the majority's conclusion that the LISD violated Coggin's procedural due process rights. They choose to grant relief when, for a multitude of reasons, Coggin has not proven a viable § 1983 claim. Even if the circumstances of Coggin's termination seem unjust, we should avoid acting as *cognoscenti* of what is right and wrong, less we effectively relegate the Constitution and state law to mere *bien pensant*.

For the above reasons, I would vacate the decision of the district court and render for the LISD.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-40731

D.C. Docket No. 6:99-CV-658

RANDALL COGGIN

Plaintiff-Appellee

v.

LONGVIEW INDEPENDENT SCHOOL DISTRICT; ET AL

Defendants

LONGVIEW INDEPENDENT SCHOOL DISTRICT

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Texas, Tyler.

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, and CLEMENT, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

(Filed July 2, 2003)

This cause came on to be heard on rehearing en banc and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

JOLLY, Circuit Judge, with whom JONES, SMITH, BARKSDALE, EMILIO M. GARZA, and CLEMENT, Circuit Judges, join, dissenting:

JONES, Circuit Judge, with whom JOLLY, SMITH, BARKSDALE, EMILIO M. GARZA, and CLEMENT, Circuit Judges, join, dissenting:

EMILIO M. GARZA, Circuit Judge, with whom JOLLY, JONES, SMITH, BARKSDALE, and CLEMENT, Circuit Judges, join, dissenting:

ISSUED AS MANDATE: July 24, 2003

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* Judge Prado, who joined our court subsequent to en banc oral argument, did not participate in this decision.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-40731

RANDALL COGGIN,

Plaintiff-Appellee,

VERSUS

LONGVIEW INDEPENDENT SCHOOL DISTRICT, ET AL,

Defendants,

LONGVIEW INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant.

Appeal from the United States District Court For the Eastern District of Texas, Tyler Division

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(Filed April 17, 2002)

Before EMILIO M. GARZA, PARKER and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

I. Introduction

Mr. Randall Coggin, a public school employee, brought this § 1983 suit against his employer, a Texas independent school district, because its board of trustees terminated his employment contract for cause without any kind of a hearing. After a bench trial, the district court rendered judgment in favor of Coggin. We affirm. Because the school board was the final policy and decision maker with respect to the discharge of employees for cause, the board's deliberate choice of discharging the employee without a hearing

was the moving force and direct cause of the unconstitutional deprivation of Coggin's property right without due process of law. Contrary to the school board's assertion, Coggin timely filed his request for a hearing under state law and did not waive his federal constitutional right to a hearing. And opposed to the school board's alternative argument, the Commissioner's wrongful refusal to grant Coggin a hearing under state law was not the moving force that deprived Coggin of his property right. The school board, not the Commissioner, terminated Coggin's employment contract. The Commissioner's failure to appoint a hearing examiner did not prevent the school board from complying with the minimal requirements of federal due process before discharging Mr. Coggin. Consequently, there was no direct causal link between the Commissioner's conduct and the school board's deliberate decision to destroy Coggin's property interest without first granting him some form of a hearing.

II. Facts and Procedural Background

Randall Coggin worked for the Longview Independent School District (LISD) for more than thirty years. From 1983 until his discharge on September 13, 1999, Coggin supervised the LISD Career and Technology Education department. At the time of his discharge, Coggin was employed under a two-year term contract spanning the 1998-1999 and 1999-2000 academic years. Before receiving notice of his proposed termination, his performance appraisals were generally complimentary. On August 12, 1999, however, Coggin received a letter from the LISD's new superintendent notifying him that the school board proposed to terminate his employment contract for engaging in various alleged improprieties, including: (1) sexually

harassing female subordinates; (2) using LISD resources for personal benefit; (3) impeding the LISD's investigation of his behavior; and (4) falsifying asbestos records.

Under the Texas Education Code, a school board has the power to terminate a term contract and discharge a teacher at any time "for good cause as determined by the board."[1] Prior to terminating a term contract, however, the board must give the teacher notice of its proposed action.[2] If the teacher desires a pre-termination hearing under state law, he must file a written request with the commissioner of education within fifteen days of receiving notice of his proposed termination.[3] Within forty-five days of receiving a timely request for a hearing, the commissioner must assign a hearing examiner to conduct a hearing and recommend findings of fact, conclusions of law, and, if appropriate, the granting of relief.[4] The school board must timely meet to consider the recommendation and record of the hearing examiner and allow each party to present oral argument.[5] Within ten days of that meeting, the board must announce a decision that includes findings of fact and conclusions of law, and that may include a grant of relief.[6] The board may adopt, reject, or change the hearing examiner's conclusions of law or proposal for granting relief, and it may reject or change the hearing examiner's

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[1] Tex. Educ. Code Ann. § 21.211(a)(1) (Vernon 1996).

[2] *Id.* § 21.251(a)(1).

[3] *Id.* § 21.253.

[4] *Id.* § 21.257.

[5] *Id.* § 21.258.

[6] *Id.* § 21.259.

finding of facts not supported by substantial evidence in the record.[7]

Pursuant to the Education Code's requirements, the LISD's notice of proposed termination informed Coggin (1) that he had fifteen days to file with the Commissioner a written request for a hearing before a hearing examiner and (2) that he must give the LISD a copy of any such request. Thus, having received notice of his proposed termination on August 12, 1999, Coggin had until August 27, 1999 to file his request for a hearing. On August 24, Coggin deposited his written requests for a hearing examiner with the U.S. Postal Service via certified mail, properly stamped and addressed to the Commissioner and the school board. The school board received a copy of Coggin's request for a hearing examiner on August 26, but the Commissioner averred that he did not receive the request until August 30. Because the Commissioner mistakenly thought that Coggin's request must have been "received," rather than "filed," by August 27, 1999, he refused to appoint a hearing examiner. On September 2, 1999, the Commissioner mailed a letter to Coggin stating that (1) the Commissioner had received Coggin's written request for a hearing; (2) the request was dated and postmarked before the August 27 deadline; (3) the Commissioner received the request on the third day following the deadline; but (4) the Commissioner would not assign a hearing examiner because Coggin's request was not received on

[7] *Id.*

time. The Commissioner also mailed a copy of that letter to the LISD's attorney.[8]

Coggin's attorney and the Commissioner exchanged several argumentative communications, but the Commissioner steadfastly refused to appoint a hearing examiner. On September 13, 1999, the board, without notice to Coggin or any kind of hearing, adopted a resolution discharging Coggin as an employee of LISD. The resolution stated that "the reasons set out in the notice of proposed termination . . . are good cause for termination." The board's resolution also noted that the Commissioner had received Coggin's request on August 30, 1999 but that no hearing was held because the Commissioner considered the request to have been untimely received.

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[8] The letter that the TEA's deputy chief counsel mailed to Coggin and the LISD reads as follows:

> To the Party and Counsel Addressed:
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> This acknowledges receipt of Mr. Coggin's request for the assignment of a certified hearing examiner. It is noted that his letter asserts that notice of the proposed termination was received by him on August 12, 1999. The letter requesting the assignment of an examiner was dated August 17, 1999, postmarked August 12[sic], 1999 and received on August 30, 1999.
>
> In order to be timely filed, the request must have been received by August 27, 1999. By filing the request late, Mr. Coggin has failed to invoke the hearing process.
>
> No hearings [sic] examiner will be assigned based upon untimely filing.

The letter incorrectly stated that Mr. Coggin's request was postmarked on August 12, 1999 rather than August 24, 1999. Notwithstanding this error, the LISD had notice that Mr. Coggin mailed his letter before the August 27, 1999 deadline.

In short, the board knew that Coggin mailed his request to the Commissioner prior to the August 27 filing deadline, and that the Commissioner received it on August 30. Therefore, when the board discharged Coggin for cause it knew that (1) he had not been given any kind of hearing; (2) he had mailed his request for a hearing before the filing deadline; and (3) the Commissioner received his request for a hearing within three days after the deadline.

On November 12, 1999, Coggin brought suit against the LISD, the Texas Education Agency (TEA), and the Commissioner under 42 U.S.C. § 1983 for depriving him of his property without due process of law. After the district court expressed its opinion that the TEA and the Commissioner had a valid Eleventh Amendment defense, Coggin dismissed his claims against them and the case proceeded solely against the LISD.[9] Following a bench trial, the district court concluded that (1) Coggin timely filed his request for a hearing as required by state law; (2) the board had notice that Coggin had not received a hearing despite his timely request; (3) the board deprived Coggin of his property without due process when it terminated his employment contract without any kind of a hearing; (4) the LISD failed to prove that Coggin had engaged in the alleged misconduct and therefore had no cause to terminate his employment contract; and (5) Coggin was entitled

[9] In Texas, independent school districts are municipal governmental entities. Tex. Educ. Code Ann. § 11.151. The TEA is a state agency headed by the commissioner of education. *Id.* §§ 7.002, 7.055. The commissioner is appointed by the governor with the advice and consent of the state senate. *Id.* § 7.051.

to $215,894 in damages and attorney's fees. The LISD appealed.

The LISD asserts on appeal that Coggin waived his right to a due process hearing by failing to timely file his request for a hearing before a hearing examiner. Alternatively, LISD argues that although Coggin was deprived of his property without due process of law, the deprivation was caused by the Commissioner's refusal to appoint a hearing examiner, not by the school board's termination of his employment contract without a hearing.

III. Discussion

A. Standard of Review.

The standard of review for bench trials is well established. We review the district court's factual findings for clear error and its legal conclusions de novo.[10]

B. Coggin Did Not Waive His Right to a Hearing.

Coggin complied with the state's procedural requirements for requesting a hearing before a hearing examiner. He timely filed his request for a hearing with the Commissioner of Education. He did not acquiesce in the board's termination of his contract right without some kind of a hearing. Therefore, he did not waive his right to some kind of hearing before the school board deprived him of his property right.

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[10] *See Kona Technology Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 601 (5th Cir. 2000).

Section 21.253 of the Texas Education Code states that "[a] teacher must *file* a written request for a hearing under this subchapter with the commissioner not later than the 15th day after the date the teacher receives a written notice of the proposed action."[11] Finding no definition of the word "file" in the Texas Education Code or in caselaw expressly pertaining to § 21.253, the district court applied an *Erie* analysis by undertaking to interpret the provision as would the Supreme Court of Texas. The court first noted that "file" cannot mean "receive" because other provisions of the Texas Education Code specifically use the word "receive" when actual receipt is required.[12] Second, the court noted that the Supreme Court of Texas has applied a ten-day mailbox rule[13] to similarly worded statutes. In *Ward v. Charter Oak Fire Insurance Co.*, for example, the Texas high court held that a person "files" a timely notice with the Industrial Accident Board (IAB) if he mails the notice before the filing deadline and the IAB receives it within ten days of the deadline.[14] The *Ward* court reasoned that this reading of the IAB's notice provision "coincides with the notice provisions of Rule 5 of the

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[11] Tex. Educ. Code Ann. § 21.253 (emphasis added).

[12] *See, e.g.*, Tex. Educ. Code Ann. § 21.254 (requiring the commissioner to appoint a hearing examiner not later than the tenth business day after the commissioner *receives* the request for a hearing); Tex. Educ. Code Ann. § 21.257 (requiring completion of the hearing not later than forty-five days after the commissioner *receives* the request for a hearing).

[13] *See Black's Law Dictionary* 964 (7th ed. 1999) (defining "mailbox rule" as "[t]he principle that when a pleading or other document is filed or served by mail, filing or service is deemed to have occurred on the date of mailing").

[14] 579 S.W.2d 909, 910-11 (Tex. 1979).

Texas Rules of Civil Procedure."[15] Third, the district court noted that § 157.1050(b) of the Texas Administrative Code, which governs hearings before the commissioner of education, explicitly provides for a mailbox rule. That section states that "[a] document shall be timely filed if it is mailed on the filing deadline . . . and was received . . . by the close of business on the third calendar day following the filing deadline."[16] Finally, the district court acknowledged that the state legislature was aware of these mailbox rules when it enacted the § 21.253 filing requirement.

Based on the foregoing state authorities, the district court concluded that the Texas Supreme Court would decide that a three or ten-day mailbox rule was implicitly incorporated in § 21.253 of the Texas Education Code; that Coggin's request was filed timely under the mailbox rules because it was mailed before the filing deadline and received within three days of the deadline; that Coggin therefore had not waived his right to some kind of pre-termination hearing; and that at the time the LISD discharged Coggin it knew that he had not had any kind of a hearing and was charged with knowledge that Coggin had timely filed his request for a hearing.[17] For the same

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[15] *Id.* at 911.

[16] Tex. Admin. Code Ann. § 157.1050(b).

[17] It is a fundamental tenet of Texas law that all persons are conclusively presumed to know the law. *See, e.g., Eades v. Drake,* 332 S.W.2d 553, 557 (Tex. 1960) (stating that people are presumed to have knowledge of both constitutional and statutory law); *Willis v. Bydalek,* 997 S.W.2d 798, 803 (Tex. App. – Houston [1st Dist.] 1999, pet. denied) ("All persons are presumed to know the law."); *Hayes v. State,* 672 S.W.2d 246, 248 (Tex. App. – Beaumont 1984, no pet.) ("The courts of this State have long held that persons are presumed to know the law and ignorance of the law excuses no man."); *Miller v. State,* 53 S.W.2d

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reasons, we agree with and adopt the district court's analysis, interpretation, and application of state law, as well as the district court's conclusion that Coggin filed his request timely and did not waive his right to a hearing.

The LISD does not cite any contrary state authority or specifically challenge any element of the foregoing *Erie* analysis, which forms the basis of the conclusion by the district court and this court that Coggin complied with the state procedural requirements for requesting a hearing before a hearing examiner. Nor does the LISD challenge the reasons supporting the district court's conclusions that Coggin's filing was timely under the mailbox rule and that he had not received the hearing to which he was entitled under state law, or a hearing of any kind. Instead, the LISD simply asserts its own conclusion that Coggin did not file his request timely and therefore waived his right to a hearing. The LISD fails to support its assertion with any authority or reasoning. Because the LISD makes no attempt to demonstrate any particular error in the district court's thorough and well-reasoned opinion, we conclude that the LISD's assertion is unfounded and that it has waived argument on this issue.[18]

838, 840 (Tex. Civ. App. – Amarillo 1932, writ ref'd) (stating that a mayor and city commissioners are presumed to have knowledge of municipal laws); *see also* 35 Tex. Jur. § 123, at 240-41 (3d ed. 1984) (noting that the presumption "is based on the sound public policy that all persons should be held responsible for their acts without regard to their actual knowledge of the law.").

[18] *See Johnson v. Sawyer*, 120 F.3d 1307, 1315-16 (5th Cir. 1997) (noting that arguments raised "without supporting argument, authority, or citations to the record" are waived).

The LISD correctly, but irrelevantly, notes that in *Logan v. Zimmerman Brush Co.*,[19] the Supreme Court acknowledged that states may impose reasonable procedural requirements for invoking due process rights:

> The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees. And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule.[20]

The LISD cannot rely on this passage, however, because Coggin complied with all of the Texas procedural requirements for triggering his right to a hearing. Moreover, while the passage expresses a valid rule of law, it is not the principal holding of *Logan*. The Supreme Court held in *Logan* that the plaintiff's property right had been destroyed without due process of law because he, like Coggin, had been denied a hearing despite his compliance with the state filing requirement.[21] Therefore, the main holding in *Logan* is consistent with and supports Coggin's claim that he was deprived of his property without due process of law.

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[19] 455 U.S. 422 (1982).

[20] *Id.* at 437 (internal citations omitted).

[21] *Id.* at 428-37.

C. The LISD's Discharge of Coggin With Knowledge That He Had Not Been Afforded a Hearing Was the Moving Force Behind the Deprivation and Injury Complained of.

The LISD was obliged under the Constitution not to destroy Coggin's property right of continued employment without due process of law. Because the board is the elected governing body of the school district and its final policy and decision maker with respect to terminating employment contracts for cause, the board's direct official action in terminating Coggin's contract, although it knew he had neither received a hearing nor waived his right to one, deprived Coggin of his property right without due process of law.

It is undisputed that under Texas law Coggin had a property right in continued employment that could not be deprived under color of state law without due process of law.[22] The district court held, and the LISD concedes in its alternative argument, that the termination of Coggin's employment contract without any kind of a hearing deprived him of his constitutionally protected property interest in continued employment. The LISD's alternative argument is that the Commissioner's refusal to appoint a hearing examiner for Coggin, rather than the school board's termination of his employment without a hearing, was the direct cause or moving force behind the deprivation of his property right and his injury.

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[22] *See Loudermill,* 470 U.S. at 538-39; *see also* Tex. Educ. Code Ann. § 21.211(a) (Coggin was a "term contract" employee who could only be fired for "good cause" or for a "financial exigency.").

Title 42 U.S.C. § 1983 (1994) provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court held in *Monell v. Department of Social Services*[23] that municipalities and other local governmental bodies are "persons" within the meaning of § 1983. It has also recognized that a municipality cannot be held liable under § 1983 solely because it employs a tortfeasor.[24] Instead, in *Monell* and subsequent cases, the Court has required a plaintiff seeking to impose § 1983 liability on a municipality to identify a municipal "policy" that caused the plaintiff's injury.[25] Locating a "policy" ensures that a municipality is held liable only for those deprivations resulting from the decisions of its legislative body or of those officials whose acts are fairly attributable to the municipality.

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[23] 436 U.S. 658, 689 (1978).

[24] *Board of County Commissioners v. Brown,* 520 U.S. 397, 402 (1997).

[25] *See Monell,* 436 U.S. at 694; *Brown,* 520 U.S. at 403; *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480-81 (1986); *City of Canton v. Harris,* 489 U.S. 378, 389 (1989).

When a municipality's final policy and decision maker in a single action directly and intentionally deprives a person of a federal constitutional right, however, the person need not show that a policy or custom caused his injury in order to recover. In such as [sic] case, the municipality's action is deemed to be the direct cause or moving force behind the deprivation of right and injury.[26] The Supreme Court made this point clear in *Board of County Commissioners v. Brown:*

> [P]roof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. Similarly, *the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains.*[27]

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[26] *See Brown,* 520 U.S. at 404 ("The plaintiff must . . . demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must . . . demonstrate a direct causal link between the municipal action and the deprivation of federal rights. *Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward.*" (emphasis added)); *see also infra* note 27.

[27] 520 U.S. at 405 (emphasis added). The Court has "held the policy requirement satisfied where no rule has been announced as 'policy' but federal law has been violated by an act of the policymaker itself. In this situation, the choice of policy and its implementation are one, and the first or only action will suffice to ground municipal liability simply because it is the very policymaker who is acting." *Brown,* 520 U.S. at 417-18 (Souter, J., dissenting) (citing *Pembaur,* 475 U.S. at 480-81;

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Thus, the Court has recognized § 1983 causes of action based on a single decision attributable to the municipality, because evidence that the municipality itself deprived the plaintiff of his federal rights is enough to prove § 1983 liability.[28] The Court has characterized these cases as "present[ing] no difficult questions of fault and causation," and has cited *Owen v. City of Independence*,[29] *Newport v. Fact Concerts, Inc.*,[30] and *Pembaur v. City of Cincinnati*[31] as examples.[32] In *Brown*, the Court explained that:

> *Owen v. Independence* and *Newport v. Fact Concerts, Inc.* involved formal decisions of municipal legislative bodies. In *Owen*, the city council allegedly censured and discharged an employee without a hearing. In *Fact Concerts*, the city council canceled a license permitting a concert following a dispute over the performance's content . . . . *Because fault and causation were obvious in each case, proof that the municipality's decision was unconstitutional would suffice to establish that the municipality itself was liable for the plaintiff's constitutional injury.*
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> Similarly, *Pembaur v. Cincinnati* concerned a decision by a county prosecutor, acting as the county's final decisionmaker, to direct county deputies to forcibly enter petitioner's place of

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Newport v. Fact Concerts, Inc., 453 U.S. 247, 250-52 (1981); *Owen v. City of Independence*, 445 U.S. 622, 625-30 (1980)).

[28] *See, e.g., Brown*, 520 U.S. at 405.

[29] 445 U.S. 622 (1980).

[30] 453 U.S. 247 (1981).

[31] 475 U.S. 469 (1986).

[32] *Brown*, 520 U.S. at 405.

> business to serve *capiases* on third parties . . . . *The conclusion that the decision was that of a final municipal decisionmaker and was therefore properly attributable to the municipality established municipal liability. No questions of fault or causation arose.*[33]

Owen v. City of Independence,[34] was decided on facts similar to the present case but involved the deprivation of liberty of a chief of police through his defamation and discharge by the city without a hearing. In *Owen* the city – through the unanimous resolution of the City Council – released to the public an allegedly false statement impugning its chief of police's honesty and integrity. The chief of police was discharged the next day. "The Council's accusations received extensive coverage in the press, and even if they did not in point of fact 'cause' petitioner's discharge, the defamatory and stigmatizing charges certainly occurred in the course of the termination of employment."[35] Nevertheless, the city twice refused the chief of police's request for a hearing and an opportunity to clear his name. The Supreme Court decided that "[u]nder the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law."[36]

Similarly, in *City of Newport v. Fact Concerts, Inc.,*[37] the City of Newport was held liable for a single, direct

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[33] *Id.* at 405-06 (internal citations omitted) (emphasis added).

[34] 445 U.S. 622.

[35] *Id.* at 634 n.13 (internal quotations omitted).

[36] *Id.* at 634.

[37] 453 U.S. 247.

action of its city council that violated a citizen's constitutional rights. In that case, an organization licensed by the city to present musical concerts recovered damages against the city under § 1983 because the city's cancellation of its license amounted to content-based censorship violating the organization's rights to free expression and due process.[38]

The Supreme Court in *Pembaur v. City of Cincinnati*,[39] held that a county prosecutor was acting as the final decisionmaker for the county when he ordered deputy sheriffs to forcibly enter a doctor's clinic without a warrant, and the county could therefore be held liable under § 1983. The Court explained that "a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body – whether or not that body had taken similar action in the past or intended to do so in the future – because even a single decision by such a body unquestionably constitutes an act of official government policy."[40] Recognizing that "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level,"[41] the Court concluded that "where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or

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[38] *Id.* at 254.

[39] 475 U.S. 469.

[40] *Id.* at 480 (citing *Owen* and *Fact Concerts* as follows: "*Owen v. City of Independence*, 445 U.S. 622 (1980) (City Council passed resolution firing plaintiff without a pre-termination hearing.); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (City Council canceled license permitting concert because of dispute over content of performance.)").

[41] *Id.* at 480

to be taken repeatedly."[42] Consequently, the Court concluded that municipal liability under § 1983 attaches where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[43]

Applying the foregoing Supreme Court decisions and reasoning to the present case, we conclude that liability attaches to the LISD for its deprivation of Coggin's property right without a hearing as required under due process. The school board was the body responsible for establishing final policy and making the final decision with respect to the termination of its employee for cause.[44] Although the board knew that Coggin had not been afforded any kind of a hearing, and that he had not waived

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[42] *Id.* at 481.

[43] *Pembaur,* 475 U.S. at 483 (citing *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 823 (1985)).

[44] The board of trustees of the LISD unquestionably is the final policy and decision maker with respect to the hiring [sic] school district employees, the determination of cause, and the decision to terminate an employee's term contract. The board has the exclusive right to terminate an employee's term contract and to discharge or suspend a teacher at any time for (1) good cause as determined by the board or (2) a financial exigency that requires a reduction in personnel. Tex. Educ. Code Ann. § 21.211(a). Furthermore, the Texas Education Code obligates the board of trustees for each school district to adopt a policy for the employment of school district personnel. *Id.* § 11.163(a). The board of trustees may formulate and approve term contracts with school district personnel containing any provisions consistent with the Education Code. *Id.* § 21.205. Consequently, the school board in the present case exercised its authority as the final policy and decision maker for the LISD when it unanimously decided to terminate Coggin's contract for cause.

his right to one, it made a deliberate choice to follow the course of discharging him without a hearing from among various alternatives.

The LISD's intentional discharge of Coggin in spite of its knowledge that he had not had any kind of hearing necessarily was the moving force behind Mr. Coggin's deprivation and injury. This case, like *Owen, Newport,* and *Pembaur,* "present[s] no difficult questions of fault and causation."[45] "[T]he conclusion that the action taken or directed by the municipality or its authorized decision-maker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains."[46] The Commissioner's failure to appoint a hearing examiner cannot be considered the moving force or the directly linked cause of Coggin's deprivation and injury. The Commissioner's failure merely caused Coggin to lose his initial state examiner's hearing; it did not deprive him of his constitutionally protected property right.

Although the LISD contends that it had no alternative to discharging Coggin without a hearing, it provides no authority or valid reasoning to support its argument. Moreover, we find that several constitutionally valid alternatives were available. For example, the LISD could have informed the Commissioner that Coggin's request was timely, urged the Commissioner to appoint a hearing examiner, and simply waited until Coggin had a hearing before finally deciding to fire him. As the district court

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[45] *Brown,* 520 U.S. at 405.

[46] *Id.*

observed, nothing in Texas law *required* the LISD to terminate Coggin's contract; rather, the Texas Education Code provides that a board *may* terminate a teacher's contract for "good cause."[47] If waiting for the Commissioner to comply created a situation "where the employer perceive[d] a significant hazard in keeping the employee on the job,"[48] the LISD could have suspended him without pay until he had been constitutionally discharged or reinstated with back pay.[49] Or the LISD could have issued Mr. Coggin another notice of proposed termination, giving the Commissioner another opportunity to grant a timely request for a hearing examiner under state law. In lieu of all other alternatives, before destroying his property right, the LISD could have given Mr. Coggin a due process hearing as required by the federal Constitution.

The LISD mistakenly contends that Texas law prohibited it from conducting a due process hearing to comply with its federal constitutional obligations. We see nothing in the state statutes or caselaw that would prohibit the LISD from complying with federal law. If there were something, of course, the state law would have to yield to federal law under the Supremacy Clause.[50] As the Supreme Court stated in *Vitek v. Jones,* "minimum [procedural] requirements [are] a matter of federal law, they are

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[47] Tex. Educ. Code Ann. § 21.211(a).

[48] *Loudermill,* 470 U.S. at 544-45.

[49] *Id.; see also* Tex. Educ. Code Ann. § 21.211(b) & (c).

[50] *See Geier v. Amer. Honda Motor Co.,* 529 U.S. 861, 894 (2000) ("When a state statute, administrative rule, or common-law cause of action conflicts with a federal statute, it is axiomatic that the state law is without effect.") (citing U.S. Const. art. VI, cl. 2; *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992)).

not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."[51] The Supreme Court in *Loudermill* clarified the relationship between the minimum requirements of federal procedural due process and state legislative power:

> The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.
>
> In short, once it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the [Texas] statute.[52]

We conclude that there is nothing in the state law which conflicts with or diminishes the LISD's obligation to comply with the minimum requirements of federal due process when terminating its public employees' property interests. Some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in employment is required.[53] Although the

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[51] 445 U.S. 480, 491 (1980); *accord Logan*, 455 U.S. at 432 (holding that federal due process requirements limit a state legislature's authority to define procedures for protecting even state-created entitlements).

[52] *Id.* (internal quotations and citations omitted) (first alteration in the original).

[53] *Id.* at 542 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 599 (1972)).

pre-termination "hearing" is necessary, it does not have to be elaborate. The Supreme Court has indicated that " '[t]he formality and procedural requisites for the hearing can vary, depending on the importance of the interests involved and the nature of subsequent proceedings.' "[54] "In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action."[55] "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[56]

Contrary to the LISD's arguments, the Texas Supreme Court's decision in *Montgomery Independent School District v. Davis*[57] does not prohibit an independent school district from holding a due process hearing in accordance with the federal constitution. The case does not involve any federal due process issues. The state law issue presented was whether the school board in a proceeding governed only by state law could re-weigh the evidence after the state appointed hearing examiner had conducted

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[54] *Id.* at 545 (quoting *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971) and citing *Cafeteria & Rest. Workers Union v. McElroy,* 367 U.S. 886, 894-895 (1961)).

[55] *Id.* (quoting *Mathews v. Eldridge,* 424 U.S. 319, 343 (1976)).

[56] *Id.* at 545 (citing *Arnett v. Kennedy,* 416 U.S. 134, 170-71 (1974) (Powell, J., concurring in part and concurring in the result) and *Goss v. Lopez,* 419 U.S. 565, 581 (1975)).

[57] 34 S.W.3d 559 (Tex. 2000).

a hearing and made factual findings.[58] *Davis* is thus inapposite to the present case.[59]

D. Arguments Not Reached.

We do not address the LISD's additional arguments that the district court made various erroneous and unnecessary findings and conclusions because the court erred in determining that the LISD violated Coggin's due process rights. We have concluded that the district court did not err.

IV. Conclusion

For the reasons assigned, the judgment of the district court is AFFIRMED.

EMILIO M. GARZA, Circuit Judge, dissenting:

In this case, Randall Coggin asserts that his right to procedural due process was violated when he was terminated without a prior hearing. Specifically, Coggin claims that he complied with Texas's reasonable procedural

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[58] *Id.* at 560.

[59] Tex. Educ. Agency, *Reyes v. Roma Indep. Sch. Dist.*, Docket No. 083-R2-199 (Comm'r Educ. Feb. 25, 2000), a state administrative law case relied upon by the LISD is also irrelevant. Like *Davis*, it presents no federal due process question. The case deals only with the state procedural law question of whether a school board may conduct its own evidentiary hearing for purposes of a proceeding governed by state law after the commissioner has denied an employee's request for a hearing examiner.

requirements for invoking his right to a due process hearing, but was denied one because of a mistake of law made by the Commissioner of the Texas Education Agency (TEA). Assuming *arguendo* that Coggin was indeed deprived of his right to procedural due process, that alone is not sufficient to support his claim against the LISD under § 1983.[1] In order to prevail against the LISD, Coggin must also establish that the LISD *caused* the deprivation of his procedural due process right. Because I believe Coggin has failed to establish this causal connection, I respectfully dissent.

Section 1983 creates a cause of action against any person who, under color of law, "subjects, or causes to be subjected," a person "to the deprivation of [a constitutional right]." Specifically, the text of § 1983 reads:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. In order to prevail on a § 1983 claim, this court has repeatedly held that it is not sufficient for a plaintiff to merely establish a violation of one of his

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[1] Because Coggin cannot establish causation sufficient to proceed against the LISD on his § 1983 claim, we need not and should not reach the question of how to interpret the term "file" in § 21.253 of the Texas Education Code, which is purely a matter of state law.

constitutional rights. A plaintiff must also show a causal connection between the deprivation of that right and the actions of the defendant against whom relief is sought. *See, e.g., Neubauer v. City of McAllen,* 766 F.2d 1567, 1571 n.11 (5th Cir. 1985) (reversing judgment against some of the defendants in § 1983 action because plaintiff failed to show that they personally caused the deprivation of a constitutional right); *Irby v. Sullivan,* 737 F.2d 1418, 1425 (5th Cir. 1964) ("To be liable under section 1983, a [defendant] must be either personally involved in the acts causing the deprivation of a person's constitutional rights, or there must be a causal connection between an act of the [defendant] and the constitutional violations sought to be addressed."). This causation requirement applies with equal force in cases where a § 1983 action is premised on a violation of procedural due process. *Reimer v. Smith,* 663 F.2d 1316, 1322 n.4 (5th Cir. 1981) ("It is axiomatic that a plaintiff cannot succeed in a § 1983 action if he fails to demonstrate a causal connection between the state official's alleged wrongful action and his deprivation of life, liberty, or property.").

The majority concedes that Coggin must establish causation to prevail, but contends that he has met that burden because the LISD made the final decision to terminate him knowing he had not received a hearing. *See* Maj. Op. at 13. Thus, the majority concludes, the LISD deprived Coggin of his property without due process of law. The problem with the majority's analysis, however, is that it focuses on the wrong causation issue. The majority bases its causation analysis on who deprived Coggin of his *protected property interest,* when the real issue is who deprived Coggin of his *procedural due process right. See* Maj. Op. at 20 (stating that the termination of Coggin's

employment contract by the LISD, and not the Commissioner's refusal to appoint a hearing examiner, is what deprived Coggin of "his constitutionally protected property right").

To better understand why the majority's reasoning fails, we must first understand what constitutes a violation of procedural due process. The key to a procedural due process claim is whether the plaintiff was afforded the quantity of process to which he was constitutionally entitled prior to the deprivation of a protected interest. In *Zinermon v. Burch,* the Supreme Court described the right to procedural due process as follows:

> The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure . . . . In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.* . . . The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

494 U.S. 113, 125-126 (1990) (internal citations and footnote omitted); *see also Brewer v. Chauvin,* 938 F.2d 860, 864 (8th Cir. 1991) ("The complained-of constitutional violation is the denial of procedural due process, not the plaintiff's discharge from public employment."). Stated simply, a plaintiff's due process rights are not violated

because his property is taken from him; his rights are violated because he was denied a certain amount of process before his property was taken. *See, e.g., Carey v. Piphus,* 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken and unjustified deprivation of life, liberty, or property."). Because the essence of a procedural due process claim is whether or not the plaintiff was afforded constitutionally adequate process, the majority's emphasis on who made the final decision to terminate Coggin is misplaced.

To determine whether the LISD caused the deprivation of Coggin's procedural due process right in this case, we must ask whether the LISD caused Coggin not to have a due process hearing. Based on the record in this case, I believe the answer to this question is no. Under § 21.253 and § 21.254 of the Texas Education Code, the sole authority to appoint a state certified hearing examiner was vested in the Commissioner of the TEA. In this case, the Commissioner denied Coggin a hearing because, based on his interpretation of § 21.253's filing requirement, Coggin's request for a hearing was untimely. Assuming the Commissioner misinterpreted the filing deadline, it was this mistake that caused Coggin to be denied a hearing and thus deprived him of his right to procedural due process. In contrast, the LISD did nothing to prevent Coggin from obtaining a pre-termination hearing. The LISD properly provided Coggin with notice of its intent to terminate his employment and of the measures he needed to take in order to preserve his right to a hearing. *See* TEX. EDUC. CODE ANN. § 21.251(a)(1) (Vernon 1996). Once the Commissioner refused to appoint a hearing examiner, the LISD had no authority to order the Commissioner to change his

mind or to appoint a certified hearing examiner on its own. *See* TEX. EDUC. CODE ANN. § 21.257. Because the actions of the LISD did not in any way cause the denial of Coggin's right to a hearing, the LISD cannot properly be said to have caused the deprivation of Coggin's right to procedural due process.

The majority attempts to overcome this causation argument by asserting that the LISD had other options available to afford Coggin due process even after the Commissioner refused to appoint a hearing examiner. *See* Maj. Op. at 21. For example, the majority suggests that the LISD could have held its own due process hearing. Alternatively, the majority contends that the LISD could have sent a second notice of termination in an effort to extend the period of time in which Coggin could file a timely request for a hearing. In essence, the majority argues that, because the LISD did not take steps to correct the mistake of the Commissioner, its inaction "caused" the violation of Coggin's right to procedural due process.

The majority's argument fails because it misstates the LISD's obligation to Coggin in this situation. Under the unique setting of this case, Texas law deliberately separates the decision to terminate a public school teacher from the duty to afford a due process hearing, presumably as a means of protecting teachers from biased school board reviews.[2] Contrary to the majority's suggestion, the LISD

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[2] The apparent purpose of this scheme is to ensure teachers a fair and independent review of the allegations against them when faced with termination prior to the expiration of their contracts. Under Texas law, Coggin could be terminated only for "good cause *as determined by the board.*" *See* TEX. EDUC. CODE ANN. § 21.211(a)(1) (emphasis added).

(Continued on following page)

had no authority to appoint a hearing examiner under this statutory scheme, nor did it have the authority to supplement Coggin's statutorily-governed hearing with its own factfinding hearing.[3] Under Texas law, the LISD's role in providing Coggin procedural due process was complete when it provided him with constitutionally adequate notice of the charges against him and informed him of the procedures he needed to follow to request a pre-termination hearing from the Commissioner of the TEA. Once the LISD fulfilled this obligation, under Texas's statutory scheme, the duty to ensure that Coggin was

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By providing for an independent pre-termination hearing, however, Texas law limits the circumstances in which a school board may find "good cause" for termination. Although the school board may reject the conclusions of law and proposed action recommended by the appointed hearing examiner in an employee's case, the school board may not reject the hearing examiner's findings of fact if they are supported by the substantial evidence in the record. *See* TEX. EDUC. CODE ANN. § 21.259.

[3] The majority suggests that "nothing in the state statute or caselaw" prohibited the LISD from holding its own hearing. Maj. Op. at 22. Yet, the Texas Supreme Court recently held that a school district may not avoid the rules set forth in the Texas Education Code for terminating an employee. *Montgomery Indep. Sch. Dist. v. Davis,* 34 S.W.3d 559, 568 (Tex. 2000) (concluding that "the Board did not have authority within the statutory scheme of subchapter F" to make additional findings beyond those made by the appointed hearing examiner); *see also* TEX. EDUC. CODE ANN. § 21.251 ("[Subchapter F] applies if a teacher requests a hearing after receiving notice of the proposed decision to: . . . (2) terminate the teacher's probationary or term contract before the end of the contract period. . . ."). The majority dismisses *Davis* as "inapposite in the present case" because it presented no due process question. Maj. Op. at 24. *Davis,* however, is very relevant because it illustrates the mandatory nature of Texas's statutory scheme for providing process. If the LISD had held its own hearing, and made factual findings supporting its decision to terminate, Coggin would undoubtably rely on *Davis* to challenge those findings.

afforded the hearing to which he was constitutionally entitled shifted to the Commissioner.[4]

Finally, the majority argues that if *state procedures* prevented the LISD from remedying the mistake of law made by the Commissioner, then those procedures should "yield to federal law under the Supremacy Clause." Maj. Op. at 22. This argument, however, assumes that the LISD retained an obligation to ensure that Coggin receive all the process he was due prior to terminating his employment. As noted above, Texas law vests that obligation in the Commissioner of the TEA – not the school district. The only way that Coggin could succeed against the LISD in this case then, is if we invalidate Subchapter F's hearing provisions. But Coggin does not challenge the constitutionality of Texas's statutory scheme, either on its face or as applied in his case. On the contrary, he concedes that the procedures set forth in Subchapter F of the Texas Education Code are precisely the kind of "reasonable procedural requirements" for invoking due process rights previously sanctioned by the Supreme Court. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (stating that "[t]he State may erect reasonable procedural requirements for triggering [due process rights]," and that the State "certainly accords due

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[4] To be sure, the majority is correct that the party who causes the deprivation of property is usually the party responsible for affording due process. Indeed, had this case arisen before the Texas legislature amended the Texas Education Code in 1995, there would be no question that the LISD could be held liable under § 1983 for terminating Coggin without a hearing. In 1995, however, the Texas legislature dramatically altered the state's provisions for terminating teachers under contract, and thereby changed this result.

process when it terminates a claim for failure to comply" with those requirements). Because Coggin argues only that the LISD violated his procedural due process right by terminating him after *the Commissioner* wrongfully denied him a hearing, his claim must fail for lack of causation.[5]

In sum, because Coggin has failed to establish a causal connection between the deprivation of his right to procedural due process and the actions of the LISD, I believe his § 1983 claim must fail. Thus, I would vacate the decision of the district court and render for the LISD.

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[5] One reason why the majority may be so determined to find causation in this case is because Coggin is barred by the Eleventh Amendment from suing the Commissioner and the TEA for damages caused by their violation of his procedural due process right. On this point, it is worth noting that Coggin was not entirely without remedy in this case. Specifically, he could have filed suit against the Commissioner and the TEA in state court for declaratory or injunctive relief at the time the Commissioner refused to appoint a hearing examiner. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) ("A person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any questions of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder."); TEX. EDUC. CODE ANN. § 7.057(d) ("A person aggrieved by an action of the [TEA] or decision of the commissioner may appeal to a district court in Travis County.").

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40731

RANDALL COGGIN

Plaintiff-Appellee

versus

LONGVIEW INDEPENDENT SCHOOL DISTRICT; ET AL

Defendants

LONGVIEW INDEPENDENT SCHOOL DISTRICT

Defendant-Appellant

.....

Appeal from the United States District Court for the
Eastern District of Texas

.....

ON PETITION FOR REHEARING EN BANC

(Opinion April 17, 2002, 5 Cir., 2002, ____ F.3d ____)

(October 7, 2002)

BEFORE: KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS and CLEMENT, Circuit Judges.[1]

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[1] Judge Robert M. Parker did not participate in this poll.

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTER [sic] DISTRICT OF TEXAS
TYLER DIVISION

RANDALL COGGIN	§	
	§	
v.	§	No. 6:99cv658
LONGVIEW INDEPENDENT	§	
SCHOOL DISTRICT	§	

FINAL JUDGMENT

(Filed Jun. 26, 2000)

On March 28, 2000, the above styled and number civil action came on for trial before the Court, the Honorable T. John Ward, United States District Judge, presiding. All issues in this case having been tried and a verdict duly rendered, the Court hereby grants and renders Final Judgment in the amounts set forth below in accordance with the Court's verdict. It is therefore

ORDERED, ADJUDGED, AND DECREED, that Plaintiff, Randall Coggin, take two hundred fifteen thousand eight hundred ninety-four dollars ($215,894.00) over and against the Longview Independent School District, Defendant. It is further

ORDERED, ADJUDGED, AND DECREED, that Plaintiff, Randall Coggin is awarded attorney's fees and costs in the amount of fifty seven thousand three hundred eighty-seven dollars and thirty-three cents ($57,387.33) over and against the Longview Independent School District, Defendant. It is further

ORDERED, ADJUDGED, AND DECREED, that Plaintiff, Randall Coggin, is awarded prejudgment interest in the amount of one thousand eight hundred ninety-nine

dollars and four cents ($1899.04) over and against the Longview Independent School District. It is further

ORDERED, ADJUDGED, AND DECREED, that this final judgment shall bear interest at the rate of 6.375% from the date of entry until paid.

All relief not expressly granted in this Judgment is DENIED. This is a Final Judgment.

SIGNED this 26th day of June, 2000.

/s/ T. John Ward
T. JOHN WARD
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

RANDALL COGGIN	§	
	§	
V.	§	CIVIL ACTION NO:
LONGVIEW INDEPENDENT	§	6:99CV658
SCHOOL DISTRICT	§	

MEMORANDUM OPINION

(Filed May 16, 2000)

The court issues this memorandum opinion to supplement the Findings of Fact and Conclusions of Law entered today in this case. To the extent this memorandum opinion includes additional findings of fact and conclusions of law, those are incorporated by reference into the Findings of Fact and Conclusions of Law. Likewise, the Findings of Fact and Conclusions of Law are incorporated by reference into this memorandum opinion.

I. Introduction

In this case, the court considers whether Randall Coggin ("Coggin"), an assistant superintendent at Longview Independent School District ("LISD"), received constitutionally adequate due process in connection with the termination of his employment contract. Bedrock federal law demands notice and an opportunity to be heard before a public employer like LISD deprives one of its employees of a protected property right in his livelihood. The procedure taken by LISD when it terminated Coggin did not afford Coggin constitutionally adequate

due process. Accordingly, the court finds for Coggin on his claim under 42 U.S.C. § 1983 and awards him the relief set forth in this opinion.

II. Facts

A. Background

Coggin began his career with LISD more than thirty years ago, in 1969. When LISD fired him, Coggin was an assistant superintendent and a supervisor over LISD's Career and Technology Department, formerly known as the vocational program. He was employed under a two-year term contract effective for school years 1998-1999 and 1999-2000.[1] Prior to March, 1999, all performance evaluations made in connection with Coggin rated his job performance very good. The Career and Technology department is unique in that its teaching process generates revenue. For instance, the building in which the teaching is conducted also has a soft drink machine which raises additional revenue used by the Career and Technology department. Because of the unique nature of the Career and Technology department, Coggin was responsible for overseeing all activities outside of traditional curriculum selection and teaching, and he was accountable for these activities.

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[1] Under Texas law, teachers are generally employed under one of three different types of contracts – "probationary," "continuing," or "term" contracts. Tex. Ed. Code Ann. § 21.001 (Vernon 1996). Most teachers are employed under term contracts, which provide for a fixed term of employment over a term of years. Coggin enjoyed employment with LISD under a two-year term contract.

Dr. B.L. Davis ("Davis") and Dr. Ron McMichael ("McMichael") previously served as LISD superintendents. Davis served from 1986 through 1988, and McMichael, from 1988 through June, 1999. Both Davis and McMichael gave Coggin very high ratings in all areas of his job performance during their respective tenures as LISD superintendents. During their tenures, Davis and McMichael followed a disciplinary practice to address performance deficiencies by providing oral notice of performance shortcomings and counseling to an affected employee in an effort to correct the conduct. Failing a correction, Davis and McMichael would institute further action with the employee.

B. LISD hired Arthur Culver as its new Superintendent.

On March 1, 1999, LISD appointed Arthur Culver ("Culver") as its new superintendent. After he was hired, Culver met with his assistant superintendents and informed them that his practice was to give oral notice of any performance deficiencies to assistant superintendents and that, failing improvements, he would give written notice to these subordinates. Should the written notice fail to cure the performance deficiencies, then Culver would take more serious action. Culver advised his subordinates that he did not like to fight, but if he got in a fight, he would fight to win.

C. The audit.

In March, 1999, Culver directed that an audit be performed of the Career and Technology department. Before then, the only audits ever performed of that

department were conducted by independent auditors on an annual basis. No independent auditor ever identified any inadequacies or deficiencies in the manner in which Coggin supervised the business side of the Career and Technology department.[2] Moreover, for several years prior to the 1999 school year, LISD's Business Manager, Doris McQueen ("McQueen"), oversaw the business side of the department. Later, Mike Albritton ("Albritton"), an assistant superintendent, handled this task. In the performance of his duties supervising the business side of the department, Coggin, in good faith, followed all of the practices and procedures of the department as he understood them based upon written and oral advice and communications from McQueen and Albritton. At no time prior to March, 1999 did McQueen or Albritton ever advise Coggin of any inadequacies or improprieties related to Coggin's practices, procedures or performance in overseeing the business side of the Career and Technology department.

The March, 1999 internal audit resulted in a sixteen (16) page written audit report dated March 23, 1999. For the first time, this audit report identified certain claimed inadequacies in the business side of the Career and Technology department. When Culver began receiving the audit results in March, 1999, but prior to the time the entire report was completed, he first became motivated to

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[2] As previously noted, Coggin's job was to oversee the aspects of the Career and Technology department that were unrelated to conventional curriculum selection and teaching. For brevity and clarification, the court will refer to this non-curriculum teaching aspect of the Career and Technology department as the "business side" of the department.

terminate Coggin's employment. On April 14, 1999, Culver met briefly with Coggin and handed him a letter bearing the same date which informed Coggin that a "routine" audit of the departments on the Career and Technology Campus identified numerous deficiencies in the management of the departments.[3] Culver's April 14th letter concluded that the information identified by the audit constituted "grounds for good cause for possible disciplinary action against [Coggin], including termination. . . . " Culver instructed Coggin to respond to the letter no later than April 21, 1999. Failing a satisfactory response, Culver would recommend disciplinary action, including possible termination, to LISD's board of trustees. Despite Culver's request that Coggin respond by April 21, 1999, when Coggin acknowledged receipt of the April 14th letter, he signed a statement that indicated he had ten working days to present a written response. Accordingly, Coggin's response was due no later than April 28, 1999. Furthermore, notwithstanding the characterization of the audit as "routine," two inconsistent reasons were offered as justifications for the audit. LISD failed to explain this discrepancy. Finally, despite having the completed audit report, and despite it being addressed to Coggin, Culver, and Albritton, Culver did not provide Coggin with the completed audit report in the brief meeting held on April 14th. Prior to April 14th, no oral notice was provided to Coggin

[3] As it would turn out, this brief exchange on April 14, 1999 between Culver and Coggin concerning the audit would be the one and only time that anyone associated with LISD met Coggin – a thirty-year employee of LISD – concerning any deficiencies, inadequacies or improprieties in his job performance.

that anyone at LISD Administration considered Coggin's department to be inadequate or deficient.

Coggin actually received a copy of the completed audit report on April 19, 1999. All of the "inadequacies" identified in the March 23, 1999 report resulted from the practices and procedures (previously subjected to independent audit) that had been followed by the Career and Technology department for thirty (30) years prior to the "routine" audit report. Moreover, Coggin held the good faith belief that he was complying with all of the established practices and procedures of LISD before he received Culver's letter dated April 14th. All of the alleged "inadequacies" could have been corrected easily by appropriate training, and, indeed, Coggin demonstrated that he was ready, willing, and able to comply with all changes necessary to correct any inadequacies identified by the March 23, 1999 audit report.

Meanwhile, on two occasions between April 14 and April 29, 2000, Culver directed Janice Canion ("Canion"), LISD's assistant superintendent of Curriculum and Instruction, to meet with Coggin to recommend that Coggin either retire or resign. Canion was Coggin's immediate supervisor. Canion understood that Culver would use all of the resources of LISD to obtain Coggin's resignation. Furthermore, Canion believed that Culver wanted to get rid of Coggin. Culver wanted Canion to stress that this was a very serious matter, that LISD had started the process, and that LISD would finish the process of removing Coggin. In other words, LISD would use the resources available to it to accomplish its goal of removing Coggin from its employ.

Coggin prepared a written response to the March 23rd audit report and, on April 28, 1999, delivered the response to Culver's office. Coggin's response explained the issues identified by Culver in his April 14th letter. In addition, Coggin made an appointment to meet with Culver on April 28, 1999 to discuss the response to the audit report. Culver cancelled the meeting. Thereafter, neither Culver, Albritton, nor Harvey Rayson (LISD's Assistant Superintendent of Personnel Services) met with Coggin to discuss the response to the audit report. Coggin's written response provided reasonable explanations to each and every "deficiency" identified by Culver in his April 14th letter.

D. Harassment allegations.

On April 30, 1999, two days after Coggin delivered his written response to the audit report, Culver signed a letter prepared on the advice of his staff and LISD's counsel advising Coggin that "due to sexual harassment complaints, you are being placed on paid administrative leave effective April 30, 1999. . . . " LISD never permitted Coggin to return to any LISD campus after the date of this letter. The statement in the April 30th letter "due to sexual harassment complaints" was inaccurate and misleading because no complaint had ever been received that described conduct which would constitute sexual harassment as defined in LISD's policy DFBA (Local) furnished along with the letter. Moreover, no witness's testimony, even if credited by the court as totally true, would support a finding of sexual harassment committed by Coggin.

That LISD did not attempt to rely on the sexual harassment allegations to justify Coggin's termination is not surprising. The allegations make up in recklessness

what they lack in substance.[4] At trial, LISD called four witnesses to support the claims of improper conduct to try to justify Coggin's termination.[5] The first, an LISD teacher named Julie Wersig, testified that in *1996*, she complained about Coggin's conduct toward her. The evidence revealed that Superintendent McMichael had previously determined that the claimed conduct did not constitute sexual harassment. Moreover, Wersig's testimony would not have supported a finding of sexual harassment. After Coggin was aware of Wersig's complaint, Coggin ceased any conduct toward Wersig which arguably could have constituted harassment. The court rejects as not credible Wersig's suggestion at trial that Coggin continued to harass her by undervaluing her job performance after she complained about Coggin in 1996. Prior to April 30, 1999, Coggin was never aware of any employee of LISD being uncomfortable with any of his conduct other than Wersig.

After Culver's April 30th letter, Albritton and Rayson (along with LISD's legal counsel) were dispatched to investigate the alleged sexual harassment allegations.[6]

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[4] The court is cognizant that sexual harassment is an all too common occurrence in the employment setting. But the court is equally concerned that allegations of such conduct by their nature impugn the integrity and reputation of those against whom they are lodged. Such allegations, made without sufficient factual basis, can unnecessarily destroy careers and irreparably injure reputations.

[5] By July 15, 1999, LISD had tempered the accusations of sexual harassment to a claim that Coggin had made inappropriate or improper comments or contact toward female employees of LISD.

[6] By the time this case came to trial, LISD no longer employed Rayson. Further, although LISD indicated to the court that Albritton, who is still employed by LISD, would be witness at the trial, the school did not call Albritton to testify.

The investigation conducted by Albritton and Rayson focused on three additional women – Lisa Hunt, Coggin's former secretary, Barbara Prater, an LISD employee who worked under Coggin's supervision from 1997 through November, 1998, and Gracie Lautaret, Albritton's secretary at the time of Coggin's termination. With respect to Hunt, the investigation uncovered her assertion that Coggin made her feel uncomfortable. Hunt ceased working for Coggin in July, 1995, and the only complaint made by Hunt prior to her trial testimony concerned an incident in July, 1995.[7] However, she never contacted anyone at LISD about any of Coggin's conduct until Albritton and Rayson began their investigation. Likewise, Hunt never indicated to Coggin in any manner that she had any objection to any of his conduct, comments, or actions which she claimed made her feel "uncomfortable." Her testimony would not support a finding of sexual harassment or improper conduct or comments.

Likewise, in May, 1999, Prater informed Albritton and Rayson that Coggin had committed certain conduct in 1997 and 1998. Like Hunt, Prater had never made any prior complaint to anyone at LISD, including Coggin, that any of Coggin's conduct made her feel uncomfortable. Prater's testimony does not support a finding of sexual harassment or improper conduct.

Finally, Lautaret stated that in *1996*, Coggin either tossed her hair or tousled her hair. She never complained

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[7] When Hunt ceased working for Coggin, she took another secretarial position with LISD at a greater salary. She was still employed by LISD at the time of trial.

about this to anyone at LISD. She only reported it to Albritton after Wersig had discussed Wersig's complaint with Lautaret. Moreover, like those before her, she never voiced any objection to Coggin about the inappropriateness of any of Coggin's conduct. This four year old incident occurred prior to the renewal of Coggin's two year contract. Like the other complaints, the court finds that Lautaret's testimony does not support a finding of sexual harassment or improper conduct sufficient to terminate Coggin's employment.

During the pendency of the Albritton/Rayson investigation, Coggin communicated with Ken Robertson ("Robertson"). Robertson has been employed as a teacher by LISD for approximately fifteen (15) years. Coggin was Robertson's supervisor during the entire term of Robertson's employment with LISD. Coggin's and Robertson's recollection of this communication varied considerably. After observing the credibility and demeanor of the witnesses, noting that Robertson had the benefit of meeting with LISD's attorneys immediately after this conversation, and considering the fact that Robertson continues to be employed by LISD, the court credits the testimony of Coggin and finds that his recollection is more accurate.[8] In

[8] The court, in making this credibility determination, does not mean to imply that Robertson's testimony about the conversation was anything less than his firmly, honestly and currently held belief about the content of the conversation. But the court is equally cognizant that two persons witnessing an event often come away from it with different impressions. Given the facts of this case, particularly the effort devoted to the endeavor of depriving Coggin of his employment, the court is obligated to judge with caution the uncorroborated account of a conversation given by one who is still employed by LISD.

so doing, the court finds that Coggin, in good faith, did not believe that Culver's April 30th letter prevented him from communicating with Robertson, that Culver's April 30th letter did not in fact prohibit Coggin from contacting Robertson, and that Coggin did not contact Robertson with the design or purpose to impede LISD's investigation into the allegations of sexual harassment or any other matter being investigated by LISD.

By letter dated July 15, 1999, LISD informed Coggin that Culver would recommend that the board terminate Coggin's contract and that the board had accepted the proposed termination. The reasons for the proposed termination were (1) Coggin made comments to and/or had physical contact with female employees in a manner that was unprofessional and inappropriate for the workplace; (2) Coggin had used LISD resources for his personal advantage; (3) Coggin impeded, obstructed, and/or interfered with LISD's investigation of Coggin's conduct by directing an individual (Robertson) to withhold information and/or not cooperate with LISD's investigation of Coggin's conduct; and (4) Coggin had made false entries in LISD's asbestos management records. Coggin did not receive this letter until August 12, 1999. The letter also informed Coggin that:

> If you desire a hearing on this proposed termination, you must file a written request with the Commissioner of Education within 15 days from your receipt of this letter. You must also send a copy of that request to the District. A copy of Longview ISD Policy DFBA (Legal) is attached for your information.
>
> The Board of Trustees will grant you the opportunity to resign from your term contract if you so

> desire. The letter of resignation must be received not later than the 15th day after you have received this notice of proposed termination.

Fifteen days after August 12, 1999 is August 27, 1999. On August 24, 199, Coggin deposited a request for a hearing to the Texas Education Agency ("TEA") in the United States mail, postage paid, by certified mail, return receipt requested. Pursuant to Culver's instructions, Coggin also deposited in the United States mail, postage prepaid, a copy of his hearing request to LISD.

The TEA refused Coggin's request for a hearing. By letter dated September 2, 1999, counsel for the TEA, Joan Allen ("Allen"), notified Coggin that his request for a hearing would be denied. According to Allen, for Coggin's hearing request to have been timely "filed," the TEA must have "received" it prior to August 27, 1999. According to Ms. Allen, the TEA did not receive Coggin's request until August 30, 2000, rendering it untimely filed under Ms. Allen's interpretation of the applicable Texas statute. On August 25, 1999, two days before the filing deadline and one day after Coggin placed it in the mail, LISD received its copy of Coggin's hearing request. A flurry of correspondence ensued between Coggin's counsel and the TEA surrounding the timeliness of the filing of Coggin's request for a hearing. The TEA steadfastly maintained, without explanation and without providing any opportunity for hearing on the issue, that it would not assign a hearing examiner to Coggin's case.

On September 13, 1999, with knowledge of the dispute surrounding the timeliness of Coggin's request for a hearing, Culver recommended that the board terminate Coggin's contract. The board heard no evidence supporting the grounds for termination and opted instead to enter a

"default judgment" against Coggin. The board adopted a resolution which provided, *inter alia*, that the TEA had declined to assign a hearing examiner and that Coggin's employment was terminated. When it terminated Coggin's contract, the LISD board had actual knowledge that Coggin had requested a hearing on the termination of his contract, the date on which he had requested it, and, finally, that no hearing had been held. Coggin had no notice that the LISD board would vote to terminate his contract on September 13, 1999. LISD offered Coggin no post-termination hearing of any sort. Shortly after the board terminated his contract, Coggin sued LISD on the grounds that LISD's termination of his two-year term contract without a hearing deprived him of his rights to procedural due process.[9]

III. Constitutional Claim

A. 42 U.S.C. § 1983

Coggin's claim, resting on the Due Process Clause, is brought pursuant to 42 U.S.C. § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights,

[9] Coggin also sued the TEA and the Commissioner of Education. Coggin abandoned those claims in the face of the those [sic] parties' assertion of the Eleventh Amendment as a defense and the court's indication at the management conference that it thought the defense was valid.

> privileges or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A school district may be held liable under 42 U.S.C. § 1983 only when its customs or policies cause constitutional torts. *Jett v. Dallas Independent Sch. Dist.*, 109 S.Ct. 2702 (1989); *Monell v. Dep't of Social Services of City of New York*, 98 S.Ct. 2018 (1978). But, in this case, there is no serious question that LISD's action in terminating Coggin constitutes the policy of the school district, because the termination resulted directly from board action. A school board's action in terminating a teacher constitutes the policy of the school district within the meaning of *Jett* and *Monell* because Texas law vests final and exclusive policy-making authority with the board of trustees. *Jett*, 109 S.Ct. at 2742; Tex. Ed. Code Ann. §§ 11.051, 11.151 (Vernon 1996). The court concludes that *Monell* is satisfied and plaintiff has proven the existence of a policy under § 1983.

B. Procedural Due Process

This case turns on whether LISD's termination of Coggin, performed without a hearing, violated his Constitutional rights. The starting point in resolving any Constitutional question is the text of the Constitution itself. Coggin alleges that LISD violated his rights guaranteed by the Due Process Clause of the Fourteenth Amendment. That clause provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

U.S. Const. Amend. XIV, 1. Due process requires that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 70 S.Ct. 652 (1950). The Supreme Court has described the "root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie v. Connecticut*, 91 S.Ct. 780 (1971) (emphasis added).[10]

Because an individual's interest in retaining his employment is so important, due process entitles a tenured public employee to a pre-termination hearing consisting of oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. *Cleveland Bd. of Ed. v. Loudermill*, 105 S.Ct. 1487, 1495 (1985). These pre-termination safeguards, coupled with a full post-termination hearing on the termination decision, satisfy the Constitutional minima required by the Fourteenth Amendment. *Id.* at 1495-96. In *Loudermill*, the Supreme Court augmented established law by insisting on an informal pre-termination hearing while at the same time expecting that the terminated employee would receive a more formal post-termination hearing following the discharge. Although *Loudermill* did not identify the scope of post-termination procedures required by the Due Process Clause, the Fifth Circuit resolved that question

[10] There is no debate over whether Coggin's two-year term contract gives rise to a property interest under state law. It clearly does, and LISD does not contend otherwise.

thirty years ago in *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970).

Under *Ferguson*, a public employee with a property interest in his continued employment is entitled under the Fourteenth Amendment to the following minimum due process rights in connection with the termination of his employment: (1) to be advised of the cause of the termination in sufficient detail to permit him to show any error that may exist; (2) to be advised of the names and nature of the testimony of the witnesses against him; (3) to be afforded a meaningful opportunity to be heard in his own defense within a reasonable time and (4) before a tribunal that possesses some expertise and an apparent impartiality toward the charges. *Ferguson*, 430 F.2d at 856; *see also Wells v. Dallas Ind. Sch. Dist.*, 793 F.2d 679, 682 (5th Cir. 1986); *Levitt v. University of Texas at El Paso*, 759 F.2d 1224, 1228 (5th Cir. 1985).[11] In addition, under *Ferguson*, when published rules and regulations establish a particular statutory procedure for the termination of a teacher's employment, they may add to the constitutional minimum. If they do, then they, too, must be followed. *Ferguson*, 430 F.2d at 856. If the failure to follow published rules and regulations causes the process to fall below the constitutional minimum, then such failure is actionable. *Levitt*, 759 F.2d at 1230.[12] It is against these minimum federal

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[11] Despite the court's request, LISD, in its post-trial briefing, failed entirely to address the Fifth Circuit's decision in *Wells*, opting instead to focus on the district court's decision, vacated by the Fifth Circuit.

[12] LISD seizes on *Ferguson's* statement that if a school district adds to the constitutional minimum by adopting more elaborate procedures, then "they too must be followed." *Ferguson*, 430 F.2d at 856. LISD parlays this statement into the suggestion that *Ferguson* imposes a

(Continued on following page)

requirements that the court must address the present issues.

III. The Texas Education Code

Under Texas law, the trustees of an independent school district constitute a body corporate. Tex. Ed. Code Ann. § 11.151(a) (Vernon 1996). The trustees as a body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district. Tex. Ed. Code Ann. § 11.151(b) (Vernon 1996). All powers and duties not specifically delegated by statute to the TEA are reserved to the trustees. *Id.* Texas law vests the board of trustees of an independent school district with the exclusive power and authority to discharge (or not to discharge) employees of a school district. Under the Texas

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heightened duty on the terminated employee to follow whatever "additional" procedures are required by the governmental entity. LISD's argument completely reads *Ferguson's* remarks out of context. As explained by the Fifth Circuit in *Levitt*, *Ferguson's* remarks were directed to the situation in which the school district adopts a procedure that affords an employee more process than is due under the constitutional minimum. *Levitt*, 759 F.2d at 1230. *Levitt* clarified *Ferguson's* statements by holding that a university's failure to follow its established procedure rises to the level of a constitutional violation only when the failure causes the process to fall below what is required by the constitution. Nonetheless, there is some ingredient of correctness in LISD's position, albeit not because of *Ferguson's* statement. A public employee who fails to follow established procedure for requesting a hearing may waive his or her right to such a hearing. *Logan v. Zimmerman Brush Co.*, 102 S.Ct. 1148, 1157 n. 7 & 1158 (1982). In *Logan*, the Supreme Court recognized that the State need not consider the merits of a claim when the claimant has failed to comply with a reasonable procedural requirement or fails to file a timely charge. *Id.* at 1157 n.7.

Education Code, a local school board may terminate a term contract and discharge a teacher at any time for good cause as determined by the board. Tex. Ed. Code Ann. § 21.211 (Vernon 1996).

LISD asserts that Coggin received all the process that was due by having the opportunity to contest the termination of his employment through the state law procedures set forth by the Texas Education Code. Essentially, these procedures are set forth in the Texas Education Code §§ 21.251, *et seq.* and they provide the state's process for addressing the situation in which a teacher requests a hearing after receiving notice of the proposed decision to terminate the teacher's probationary or term contract. Tex. Ed. Code Ann. § 21.252 (Vernon 1996). A discussion of these procedures is necessary because LISD's election to terminate Coggin in the wake of a deficiency in these procedures determines the outcome of this case.

Under the Texas Education Code, a teacher who has received notice of his or her proposed termination must file a written request for a hearing with the commissioner of education for the State of Texas not later than the 15th day after the date the teacher receives written notice of the proposed action. The teacher must also provide the district with a copy of the request. Tex. Ed. Code Ann. § 21.253 (Vernon 1996). If a teacher files a written request within the time frame set forth by § 21.253, the statute imposes a duty on the commissioner to assign a hearing examiner to the case not later than the 10th business day

after the date on which the commissioner receives the request for a hearing.[13]

The teacher's rights at the hearing are set forth in § 21.256. At the hearing, a teacher has the right to: (1) be represented by a representative of the teacher's choice; (2) hear the evidence on which the charges are based; (3) cross-examine each adverse witness; and (4) present evidence. Moreover, the Texas Rules of Civil Evidence apply at the hearing, and the hearing is conducted in the same manner as a trial without a jury in a district court of the state of Texas. Tex. Ed. Code Ann. § 21.256 (Vernon 1996).

Various deadlines expedite the hearing process. Not later than the 45th day after the date on which the commissioner receives a teacher's written request for a hearing, the hearing examiner must complete the hearing and make a written recommendation that: (1) includes findings of fact and conclusions of law; and (2) may include a proposal for granting relief. The proposed relief may include reinstatement, back pay, or employment benefits but may not include attorney's fees or other costs associated with the hearing or appeals from the hearing. Then, the hearing examiner must send a copy of the recommendation to each party, the president of the board of trustees,

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[13] Under Texas law, a hearing examiner has powers similar to those possessed by a judge. For instance, the hearing examiner may issue subpoenas at the request of either party for the attendance of witnesses and the production of documents at the hearing. Tex. Ed. Code Ann. § 21.255 (Vernon 1996). Moreover, the hearing examiner may allow depositions to be taken by either party for use in discovery prior to the hearing. *Id.* The hearing examiner may also allow either party to use other means of discovery. *Id.*

and the commissioner. Tex. Ed. Code Ann. § 21.257 (Vernon 1996). Once the board of trustees receives the hearing examiner's recommendation, the board must consider the recommendation and the underlying record at the first board meeting for which notice can be posted in compliance with the Texas Open Meetings Act. However, in no event may the board's consideration occur later than the 20th day after the date that the president of the board receives the hearing examiner's recommendation and the record of the hearing. Tex. Ed. Code Ann. § 21.258(a) (Vernon 1996). At the board meeting, the board must consider the hearing examiner's recommendation and must also permit each party to present an oral argument to the board. Tex. Ed. Code Ann. § 21.258(b). Finally, not later than the 10th day after the board meeting held under Section 21.258, the board must announce a decision that: (1) includes findings of fact and conclusions of law; and (2) may include a grant of relief. The board may adopt, reject, or change the hearing examiner's conclusions of law, proposal for granting relief, or findings of fact, provided that a finding of fact may be rejected or changed only if the finding of fact is not supported by substantial evidence. Tex. Ed. Code Ann. § 21.259 (Vernon 1996). A teacher wishing to appeal the board's decision under § 21.259 may appeal to the commissioner of education for the State of Texas by filing a petition for review. The appeal to the commissioner proceeds under §§ 21.301-306. Judicial review through the state courts of Texas of the decision of the commissioner issued after an appeal is taken under §§ 21.301-306 is allowed by Tex. Ed. Code § 21.307.

The parties have cited no law that allows for review of the commissioner's failure to assign a hearing examiner.[14] LISD suggests, in its post-trial brief, that "[d]isputes under the school laws of Texas, and specifically disputes arising under Texas Education Code, Chapter 21, are subject to appeal to the Commissioner of Education." (Defendant LISD's Closing Argument and Brief, p. 6, *citing* Tex. Ed. Code § 21.301). But § 21.301 does not address the situation where the TEA, for whatever reason, declines to assign a hearing examiner. The state law review procedures provided under the Texas Education Code assume that a hearing examiner has held a hearing, made findings of fact, conclusions of law, and a recommendation for relief. In addition, § 21.301 assumes that a school board has taken action upon a hearing examiner's recommendation. The terms of § 21.301, *et seq.* do not apply to the commissioner's failure to appoint a hearing examiner. Moreover, LISD's brief is heavy with arguments, but light on authority, that Coggin has waived "his only legitimate claim [for denying him a hearing examiner] against his only legitimate defendant [TEA and/or the Texas Commissioner of Education]." LISD does not suggest what state law claim Coggin possesses against the commissioner or the TEA. But as discussed *infra*, LISD's board action in voting to terminate Coggin, performed with knowledge of the TEA's wrongful action and on the advice of counsel, renders *LISD* a legitimate defendant to Coggin's due process claim.

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[14] Neither party suggests the relevance or applicability of Tex. Ed. Code Ann. § 7.057 (Vernon 1996), regarding appeals to the Commissioner of Education; consequently, the court will not consider it.

IV. The "Mailbox" Rule

The crux of LISD's position is that the TEA's denial of a hearing examiner was legally correct. The argument goes that Coggin must timely file a request for a hearing and that, because the TEA determined that he failed to do so, it could legally refuse to appoint a hearing examiner. This "legal" refusal, according to LISD, empowered LISD to enter a default judgment against Coggin. Therefore, according to LISD, since it afforded Coggin notice of the charges and the *opportunity* for a hearing of which he failed to take effective advantage, LISD provided Coggin all the process he was due before terminating his contract. LISD's position is infected with the erroneous assumption that Coggin failed to file his request for a hearing timely.

It is undisputed that Coggin placed his request for a hearing examiner in the mail in advance of the filing deadline. It is also undisputed that Coggin provided LISD a copy of his request for a hearing examiner in advance of the filing deadline. Nonetheless, counsel for the TEA apparently determined that Coggin's request was not filed timely because it had not been received by the TEA within the time period prescribed under § 21.253 for "filing."[15] LISD adopts the TEA's view in this case and posits that the term "filing" as used in § 21.253 actually means "receipt by the commissioner," without regard to whether a party placed the request in the mail prior to the expiration of fifteen (15) days after the party received notice of the proposed termination. According to LISD, the

[15] The record is silent on what, if any, communications, occurred between counsel for LISD and counsel for the TEA prior to and after TEA determined that Coggin failed to file his request on time.

"mailbox" rule does not apply to this case – Coggin's alleged failure to file his request timely enabled the TEA to deny him a hearing examiner and permitted LISD to render a "default judgment" on the termination issue. Based on the plain language of the statute, direction from the Texas Supreme Court, and the TEA's own regulations, this court disagrees with LISD's construction of § 21.253.

No Texas court has addressed the meaning of "filing" as provided in § 21.253. Moreover, § 21.253 speaks in terms of "filing" but does not define it. In construing a Texas statute, the court must approach the task as a Texas court would. *See, e.g., McNeil v. Time Ins. Co.*, 205 F.3d 179, 183 (5th Cir. 2000). This court must attempt to give effect to the Legislature's intent. *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex. 1997). In ascertaining this intent, the court may consider the object to attain, the circumstances of the statute's enactment, legislative history, former statutory and common law, and the consequences of particular construction. Tex. Gov't Code § 311.023; *Mitchell Energy*, 943 S.W.2d at 438. This court should attempt to give the statute the meaning the Legislature intended, keeping in mind the old law, the evil, and the remedy. *Id.*

The court begins with the actual terms the Legislature employed. Under Tex. Gov't Code § 311.023, this court must consider the consequences of a particular construction. In doing so, the court must strive to give effect to all parts of the statutory scheme. Bearing these canons of construction in mind, the plain language of the statute suggests that "filing" and "receipt by the commissioner" do not mean the same thing. Numerous sections of the Texas Education Code other than § 21.253 specifically refer to the act of "receipt" either by a party or by the

commissioner. *See, e.g.*, Tex. Ed. Code Ann. § 21.251 (applying subchapter if a teacher requests a hearing after *receiving* notice of proposed decision to terminate) (emphasis added); Tex. Ed. Code Ann. § 21.254 (requiring commissioner to assign hearing examiner not later than the 10th business day after the date on which the commissioner *receives* the request for a hearing) (emphasis added); Tex. Ed. Code § 21.257 (requiring completion of hearing and recommendation of hearing examiner not later than 45th day after the date on which the commissioner *receives* a teacher's written request for hearing) (emphasis added). Had the Legislature intended "filing" to be synonymous with "receipt by the commissioner," the Legislature would simply have measured the time limits provided in §§ 21.254 and 21.257 from the date of "filing" of a teacher's written request for a hearing. The use of the distinct terms "filing" and "receipt" indicates that the Legislature ascribed a different meaning to each. LISD's argument on this point is inconsistent with the plain language of the statute.

Moreover, authority from the Texas Supreme Court is directly contrary to LISD's position. In *Ward v. Charter Oak Fire Ins. Co.*, 579 S.W.2d 909 (Tex. 1979), the Texas Supreme Court addressed a statutory provision which required the "filing" of a notice with the Industrial Accident Board ("IAB") within twenty (20) days after a worker's compensation claimant received a decision from which he or she sought judicial review. In *Ward*, the claimant sought to challenge the IAB's decision by filing a suit for judicial relief. She mailed her notice to the IAB within the statutory period, but the post office erroneously returned the notice for insufficient postage. The claimant received the returned notice on the last day before the

expiration of the twenty (20) day period and again deposited it in the mail. The IAB received the notice two days after the expiration of the statutory period.

The trial judge dismissed the case for lack of jurisdiction. On appeal, the Supreme Court reversed and held that when a notice was mailed within a statutory 20-day period for filing with the IAB and received by the Board not later than ten days after the expiration of the deadline, the notice was timely "filed" within the meaning of the statute. *Ward*, 579 S.W.2d at 910-11. The Court reasoned that any other construction of the statute would lead to severe injustice, particularly when a claimant has given timely notice using a universally recognized method, but, through no fault of her own, the IAB failed to receive the notice within the statutory deadline for filing. The Court noted that Texas Rule of Civil Procedure 5 provided that a document placed in the mail, sent first class, properly addressed and posted, was deemed filed on the date of mailing if mailed prior to the expiration of the filing deadline and received not more than ten (10) days after the expiration of the filing deadline. In the interest of uniformity, the court adopted a construction of the Worker's Compensation statute consistent with Tex. R. Civ. P. 5.[16] Consistent with Tex. Gov't Code § 311.023, the court presumes that the Texas Legislature adopted the "filing" language of Tex. Ed. Code § 21.253, with knowledge of the Texas Supreme Court's decision in *Ward*. The facts of this case are very close to those addressed in

[16] The retention of the mailbox rule as an integral part of the Texas Rules of Civil Procedure continues to reflect the philosophy or policy views of the Texas Supreme Court.

Ward.[17] LISD's argument is contrary to the Supreme Court's holding in *Ward*.

Finally, the TEA's regulations draw a distinction between filing and receipt and specifically address the mailbox rule. The Texas Administrative Code provides certain regulations to govern hearings before the before [sic] the Commissioner of Education. Specifically, 19 TEX. ADMIN. CODE § 157.1050, entitled Filing of Documents, states that "[a]ny document shall be deemed filed only when actually received. . . ." However, § 157.1050(b) adopts the mailbox rule and provides:

> [d]ocuments may be filed by mail if sent by certified United States mail, return receipt requested, or by an overnight courier service. *A document shall be deemed timely filed if it is mailed on the filing deadline as evidenced by a legible postmark placed on the envelope by the United States Postal Service and the document was received by the director of hearings, the hearings examiner, or the designated docket clerk by the close of business on the third calendar day following the filing deadline.*

TEX. ADMIN. CODE § 157.1050(b) (emphasis added).

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[17] In this case, Coggin deposited his request in the mail three days prior to the filing deadline. The evidence indicates that Coggin inquired of the Post Office the length of time it would take for the request to be delivered to Austin, Texas. The post office indicated that it would take no more than three days for the request to be delivered. Ordinarily it takes just two days for mail to travel from Longview, Texas to Austin, Texas. Coggin, in reliance on the Post Office's information, chose a method universally recognized as providing notice but, through no fault of his own, the notice did not arrive in Austin until after the filing deadline. The similarities to *Ward* are striking.

The TEA's own general regulations governing hearings before the commissioner of education provide that when a document is filed by mail, it is deemed timely *filed* if mailed by the filing deadline and *received* by the third day after the filing deadline. Conversely, the TEA knows how to abrogate the mailbox rule. *See* 19 TEX. ADMIN. CODE § 157.10 (governing hearings before the State Board of Education and providing that "[a]ny document shall be deemed filed with the SBOE only when actually received by the designated docket clerk for the hearings and appeals division. . . . "). While § 157.10 applies to cases of a different sort than the present, it indicates that the mailbox rule is not applicable to proceedings brought under that subchapter. Thus, the TEA knows how to adopt regulations dispensing with the mailbox rule. Finally, § 157.1041 states that the Texas Rules of Civil Procedure will prevail under subchapter AA except as modified. The Texas Rules of Civil Procedure deem a document filed by mail to be timely filed when postmarked prior to the deadline and received by the clerk of court not more than ten days after the expiration of the filing deadline. TEX. R. CIV. P. 5. The incorporation by the TEA of the Texas Rules of Civil Procedure, including Rule 5, reflect the views of the agency that, generally, those rules will govern cases pending before the TEA. Based on the plain language of the Texas Education Code, the long-standing court construction of the term "filing" and evidence that the TEA's general rule is that filing by mail is permitted if the instrument is mailed on or prior to the deadline for filing, the court concludes that Coggin timely filed his request for a hearing examiner within the meaning of § 21.253.

V. LISD Denied Coggin Due Process

Given the court's conclusion that Coggin timely filed his request for a hearing examiner, due process mandated that he be given one on the termination of his contract. The TEA refused to appoint a hearing examiner. And, LISD, acting upon the TEA's wrongful refusal, terminated Coggin despite the fact that he had received no hearing. When the board voted to terminate Coggin's contract, it knew about the dispute between Coggin and the TEA over Coggin's request for the appointment of a hearing examiner. When the TEA refused to capitulate, LISD yielded to its erroneous interpretation of state law instead of heeding the requirements of federal law. This conduct ratified the TEA's wrongful refusal to provide a hearing. In sum, when LISD terminated Coggin without a hearing, it violated his right to procedural due process.

For purposes of this case, the court assumes, *arguendo*, that the procedures set forth by the Texas Education Code providing for assignment of a hearing examiner, review by the board of trustees, review to the commissioner, and state court judicial review as set forth above, if followed, meet minimum due process requirements under federal law. But the point of this case is that this process was not followed and LISD clearly knew or should have known that it was not followed when it voted to terminate Coggin's employment. As previously noted, the hallmarks of due process are notice and an opportunity for hearing. *Mullane*, *supra*. The undisputed facts establish that LISD, in voting to terminate Coggin, deprived him of his property interest without a hearing, despite the fact that he had properly requested one. Further, that the TEA and LISD may have been mistaken in the law is beside the point – the Supreme Court has held that an isolated

incident by a policymaking board that results in the deprivation of due process subjects the local governmental entity to liability under § 1983. *Owen v. City of Independence, Mo.*, 100 S.Ct. 1398 (1980); *see also Bd. of County Commissioners of Bryan Oklahoma v. Brown*, 117 S.Ct. 1382, 1389 (1997) (noting that proof that a municipality's legislative body has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably).[18] As such, LISD deprived Coggin of his rights to due process by terminating his employment without a hearing.

LISD insists that it complied "meticulously" with its duty under state law to provide notice of the proposed termination to Coggin. Whatever the merits of LISD's compliance with state law, it is well-settled that federal due process requires notice *and* the opportunity for hearing. In advancing this argument, LISD completely ignores the federal law obligations imposed upon a public employer under *Loudermill* and *Ferguson* to ensure the second component of due process – the opportunity to be heard.

The court also rejects LISD's assertion that it found itself in a "catch-22." According to LISD, it had no options available to it to remedy the situation created by the TEA's failure to provide a hearing examiner. In support of its position, LISD clings to decisions from the Texas Commissioner of Education ("commissioner's decisions") that suggest that a local school board has no power to

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[18] LISD has not raised the applicability of the *Parrat/Hudson* doctrine. Accordingly, the court will not consider it.

conduct an evidentiary hearing on the termination of a term contract after the Commissioner has denied a request for a hearing examiner. LISD offers no support for the proposition, and the court has found none, that *required* it to terminate Coggin's contract when a hearing, though properly requested, has been denied. Rather, the Texas Education Code provides that a board *may* terminate a teacher's term contract for good cause as determined by the board. Tex. Ed. Code § 21.211. And, the commissioner's decisions relied upon by LISD suggest that a board "can" (not must) enter a default judgment upon proof that the teacher did not timely request a hearing. *Reyes v. Roma*, Docket No. 083-R2-199 (Comm'r Educ. Feb. 2000, p. 10). In this case, such proof simply did not exist. Moreover, in *Reyes*, the Commissioner held that "[a] teacher's contract is not automatically terminated because no timely request for hearing was made." *Id.* Simply put, the board could have voted against Coggin's termination. Had it still desired to terminate Coggin, the board was free to institute the process anew. What LISD could not do, as a public employer, was to deprive Coggin of his property or liberty interest without due process of law. Instead of proceeding with caution, LISD elected to vote to enter a "default judgment" and terminate Coggin. LISD's ability to vote against the termination defeats its claim of a "catch-22."

Alternatively, to avoid any potential due process issues, LISD could have simply followed the requirements set forth in *Ferguson v. Thomas* and granted Coggin a termination hearing. LISD shuns this alternative by relying on commissioner's decisions suggesting that the board lacks the authority under state law to hold a fact

finding hearing. LISD's position fundamentally misconceives the distinction between state procedural safeguards and the rights guaranteed by the Due Process clause. That the Commissioner might have invalidated a procedure under Texas state law is irrelevant to the question whether the public employer has complied with federal requirements for due process. Settled law instructs that whether a particular procedure is permitted or allowed under state law is beside the point for determining whether constitutional minimums are satisfied. The Supreme Court has repeatedly admonished that once the state creates a property right, federal law governs the procedure by which that right may be deprived. *Logan*, 102 S.Ct. at 1155-56 (noting that "[e]ach of our due process cases has recognized, either explicitly or implicitly, that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.'"); *see also Loudermill*, 105 S.Ct. at 1493 ("The point is straightforward: The Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology."). Indeed, LISD's argument was implicitly rejected in *Loudermill* – the Court held that despite Ohio's post-termination procedures, as a matter of federal constitutional law, the employees were entitled to pre-termination process. Had the board held a *Ferguson* hearing on Coggin's termination for the purposes of satisfying federal due process requirements and, in doing so, failed to follow the state's procedures, Coggin plainly could not be heard to

raise a due process challenge. It is settled law in the Fifth Circuit that only when the failure to follow state procedures causes the process to fall below that which is constitutionally required is the failure actionable as a due process claim. LISD's argument is essentially that because state law creates the property interest, state law determines the procedures by which that interest is deprived. This position is simply inconsistent with well-settled federal due process law.

The court, by its opinion, is cognizant of the fact that LISD sought the advice of counsel prior to making the decisions it made. However, the Supreme Court has held that a local government does not enjoy good faith immunity for deprivations of constitutional rights. *Owen v. City of Independence, Mo.*, 100 S.Ct. 1398 (1980). The court is also aware that the burden of its judgment will ultimately come to rest on the shoulders of the local taxpayers, but the Supreme Court has rejected this argument as well:

> It has been argued, however, that revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in *Thayer v. Boston* – 'that the city, in its corporate capacity, should be liable to make good the damage sustained by an [unlucky] individual, in consequence of the acts thus done.' After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal authorities, it is fairer to allocate any resulting financial loss to the inevitable costs

> of government borne by the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.

Owen, 100 S.Ct. at 1417 (internal citations omitted). Accordingly, whether LISD's board members acted in good faith or the local taxpayers will bear the burden of any judgment makes no difference in the outcome of this case.

VI. Relief

Having found for Coggin on his procedural due process claim, the court must consider the appropriate relief. Coggin seeks compensatory damages resulting from LISD's denial of his procedural due process rights. "Doubtless, the basic purpose of a § 1983 damages award should be to compensate persons for injury caused by the deprivation of constitutional rights." *Farrar v. Hobby*, 113 S.Ct. 556, 573 (1992) (internal quotations omitted); *Carey v. Piphus*, 98 S.Ct. 1042, 1047 (1978); *Hill v. City of Pontonoc, Miss.*, 993 F.2d 422, 425 (5th Cir. 1993). In *Hill*, the Fifth Circuit held that a plaintiff seeking damages for a procedural due process violation must show that his injuries resulted from the denial of due process itself, and not from a corresponding justifiable deprivation. *Hill*, 993 F.2d at 425. Under *Hill*, an employer may defend a denial of due process with proof that the employee would in any event have been fired. *Id.* Back pay may be awarded only when there is a finding that the discharge would not have occurred if the employee's procedural due process rights had been observed. *Id.* at 426 (*quoting Brewer v. Chauvin*, 938 F.2d 860, 864 (8th Cir. 1991) (en banc)). Under *Hill*, once the employee has proven a deprivation of procedural due process, it is the employer's burden to show that the

employee would have been fired anyway. *Id.* at 426 (noting that district court "erroneously placed the burden of proof on causation on the plaintiff"); *see also Carey*, 98 S.Ct. at 1050.

The Supreme Court has repeatedly held that due process ensures the right to an unbiased tribunal. *Schweiker v. McClure*, 102 S.Ct. 1665, 1670 (1982); *Marshall v. Jerrico, Inc.*, 100 S.Ct. 1610, 1613 and n.2 (1980). Therefore, the court presumes that LISD's board or any appointed hearing officer would have assumed the role of an unbiased tribunal had Coggin received the hearing to which due process entitled him. In so doing, the court must consider whether LISD's board or any appointed hearing officer, acting as an unbiased tribunal, would have terminated Coggin for any of the grounds set forth in the letter dated July 15, 1999.

In this case, the court is satisfied that Coggin would not have been terminated had he received due process. In this regard, the court holds that LISD has failed to carry its burden of proving that, despite the failure to afford due process, acting as an unbiased tribunal it would have terminated Coggin's employment anyway. Moreover, even if the burden of proof were reversed, the court would find that Coggin met his burden to show that the deprivation of his property right was unjustified.

At trial, LISD offered four reasons to justify its termination of Coggin's employment. LISD asserted that Coggin (1) made comments to and/or had physical contact with female employees in an unprofessional manner, including Barbara Prater, Julie Weirsig, and LeeAnn Hunt; (2) used LISD resources for personal advantage; (3) made false entries in LISD asbestos management records;

and (4) impeded, obstructed and/or interfered with LISD's investigation of Coggin's conduct *vis a vis* requesting Robertson to withhold information. The evidence establishes that, had Coggin received due process, an unbiased tribunal would not have decided to terminate him based on these reasons, singularly or collectively.

First, the allegations that Coggin made comments to and/or had physical contact with female employees in an unprofessional manner are rejected as purported justifications. LISD has failed to carry its burden to prove that an unbiased hearing officer or an unbiased school board would have terminated Coggin for this reason. The facts underlying these allegations have been previously addressed and the court will not repeat them here. Likewise, the court has found that any use by Coggin of district resources was at best, speculative, and, in any event, was consistent with the policies and procedures actually employed by LISD for the past thirty years. Moreover, Coggin's conduct was tacitly approved by his previous supervisors. With respect to the "false" entries in the LISD asbestos management records, the court has found that Coggin complied with all posting requirements of the asbestos abatement program, and, although he failed to keep a copy of all postings, he attempted in good faith to re-create the posting records using his recollection and other available information. Coggin never attempted to conceal any of his "re-created" notes from anyone – he left them in his office after he was directed off the campus on April 30, 1999. Finally, the court has found that Coggin's contact with Robertson was not designed to impede or affect the outcome of any investigation being conducted by LISD. In sum, neither a hearing examiner nor the LISD

board acting as an unbiased tribunal would have terminated Coggin, a thirty-year employee with a nearly exemplary performance record for these reasons. Simply put, good cause did not exist for the termination of Coggin's employment.[19] The court finds that had Coggin been afforded due process of law, he would more likely than not still be working for LISD.

Having made these findings, the court concludes that Coggin is entitled to damages caused by the unjustified deprivation of his property right without due process of law. The court awards back pay from September 16, 1999 to May 15, 2000 in the amount of $37,500. Further, although reinstatement is ordinarily the preferred remedy to compensate the plaintiff for expected future losses, the court specifically finds that this is an extraordinary case in which reinstatement is not appropriate. In this regard, the court finds that any animosity existing between Culver and Coggin preceded, and was not caused by, the present litigation. The court is cognizant of Fifth Circuit holdings suggesting that the vindication of constitutional rights will nearly always generate friction among co-workers. But returning an assistant superintendent such as Coggin to work as a subordinate to Culver is plainly not feasible. An assistant superintendent's job involves a great deal of discretionary activities. Given the court's observations of the demeanors, attitudes and personalities of the parties

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[19] "Good cause" means (1) the failure to perform as an ordinary employee would and (2) such failure is of a serious nature. *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572 (Tex. App. – Houston [1st Dist.] 1992 no writ); *Duncan v. Highland Park ISD*, Docket No. 085-R2-398 (Comm'r Educ. May 1998).

involved, the court finds that it is more likely than not that future performance evaluations would be suspect. Finally, it is plain to this court Culver does not want Coggin working for LISD. Although Culver's disdain is insufficient to supply cause to terminate Coggin, it is a factor the court considers in determining whether to substitute front pay for reinstatement.

The amount of front pay awarded will be two years salary. The reason for this award derives from the term of Coggin's contract and the fact that Coggin would not have been terminated had he received due process. LISD never opted to institute "nonrenewal" proceedings against Coggin. Coggin's wrongfully-terminated two year contract would have expired at the end of the 1999-2000 school year. If a district elects to "nonrenew" a contract, it must give written notice to the teacher not later than the 45th day before the last day of instruction in a school year of the district's intent not to renew the contract. Tex. Ed. Code Ann. § 21.206(a) (Vernon 1996). Failure to do so constitutes an election by the district to employ the educator in the same professional capacity for the following school year. Tex. Ed. Code Ann. § 21.206(b) (Vernon 1996). Therefore, Coggin at least has an entitlement to an additional year of employment to which he would be reinstated. The court also credits the testimony of Dr. McMichael and Dr. Davis that Coggin's ability to acquire employment will be hindered by the actions of LISD. However, the court believes that Coggin ultimately will secure future employment and does not believe that it will take him longer than two years to do so. Accordingly, a reasonable prediction of the front pay appropriately substituted for reinstatement is two years salary. The court awards front pay in the amount of $136,094, which

is derived from Coggins ending salary of $60,547, increased by $5,000 each year for two years. Because Coggin also lost the benefit of medical insurance paid on his behalf, the court will award an additional $4,800 to compensate Coggin for the loss of two years of medical insurance. Finally, although future retirement income streams are difficult to predict, given the testimony of what Coggin's annual retirement pay would have increased if he would have worked for an additional five years, the court will award an additional $20,000, which the court believes, if invested now in retirement assets, would suffice to compensate Coggin for two years of lost contributions to his retirement. Assuming the court is correct and Coggin will regain employment in two years, contributions to his retirement likewise will commence again at this time.

Finally, the court finds that Coggin suffered mental anguish and emotional distress flowing directly from the deprivation of procedural due process as distinct from the deprivation of the property interest itself. The court awards damages for mental anguish and emotional distress in the amount of $17,500. The total amount of damages awarded is $215,894. Plaintiff is directed to submit a proposed judgment and an application for attorney's fees in accordance with this opinion within ten (10) days. The defendant shall respond within ten (10) days after Plaintiff submits his proposed judgment and will at that time advise the court if it desires an evidentiary hearing on attorney's fees.

So **ORDERED** and **SIGNED** this 16th day of May, 2000.

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTER [sic] DISTRICT OF TEXAS
TYLER DIVISION

RANDALL COGGIN	§	
	§	
v.	§	No. 6:99cv658
LONGVIEW INDEPENDENT	§	
SCHOOL DISTRICT	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 16, 2000)

Randall Coggin ("Coggin") brought suit against the Longview Independent School District ("LISD"), complaining that LISD terminated his term contract without affording him procedural due process. Trial was held to the court without a jury from March 28-30, 2000. During the presentation of the case, the parties called several witnesses to testify and presented evidence to the court. Pursuant to Fed. R. Civ. P. 52, after considerable reflection and review, the court finds the following facts and states its conclusions of law. In making its findings of fact, the court has considered the admissible testimony offered by each witness, the admissible documentary evidence, and the reasonable inferences which could be drawn therefrom. The court has also carefully considered the testimony of each of the witnesses in light of their demeanor on the witness stand, any potential bias, and ability to recall the material events giving rise to this suit. The court finds the following facts:

1. Coggin was a long time employee of LISD. He began his career with LISD in 1969. When he was terminated, Coggin was LISD's Assistant Superintendent of the Career

and Technology Campus. At the time he was terminated, Coggin was employed under a two-year term contract effective for the school years 1998-1999 and 1999-2000.

2. By letter dated July 15, 1999, LISD's Superintendent, Arthur Culver ("Culver") informed Coggin of Culver's recommendation to LISD's Board of Trustees ("Board") that Coggin's employment be terminated. The letter dated July 15, 1999 also informed Coggin that the Board had accepted the proposed termination of Coggin's employment. This letter also advised Coggin of the following:

> If you desire a hearing on this proposed termination, you must file a written request with the Commissioner of Education within 15 days from your receipt of this letter. You must also send a copy of that request to the District. A copy of Longview ISD Policy DFBA (Legal) is attached for your information.
>
> The Board of Trustees will grant you the opportunity to resign from your term contract if you so desire. The letter of resignation must be received not later than the 15th day after you have received this notice of proposed termination.

3. The stated reasons for the proposed termination were as follows: (1) Coggin made comments to and/or had physical contact with female employees in a manner which was unprofessional and inappropriate for the workplace; (2) Coggin used LISD resources for his personal advantage; (3) Coggin impeded, obstructed, and/or interfered with LISD's investigation of his conduct by directing an individual to withhold information and/or not cooperate with the district's investigation of Coggin's conduct; (4) Coggin made false entries in LISD asbestos management records. The letter also noted that each ground constituted

good cause for proposed termination and/or constituted a violation of the Code of Ethics and Standard Practices for Texas Educators.

4. On August 12, 1999, Coggin received the letter described in findings of fact nos. 3 and 4. Therefore, Coggin had until August 27, 1999, to request that a hearing examiner be appointed.

5. On August 24, 1999, Coggin deposited his request for a hearing examiner to the Texas Education Agency ("TEA") in the United States mail, properly addressed, postage paid, by certified mail, return receipt requested. Pursuant to Culver's instructions, Coggin also deposited in the United States mail, properly addressed, postage prepaid, a copy of his request to LISD.

6. Texas Education Code § 21.253 provides the fifteen-day filing deadline for requests for appointments of hearing examiners.

7. By letter dated September 2, 1999, counsel for the TEA, Joan Allen ("Allen"), notified Coggin that the TEA would not appoint a hearing examiner. Allen's letter stated that Coggin failed to file timely his request for a hearing examiner. According to Allen, to have been timely "filed," the request must have been received by the TEA on or before August 27. The TEA did not receive Coggin's request for a hearing examiner until August 30, 1999. Allen's letter informed Coggin that, by filing his request late, he had failed to invoke the hearing process.

8. LISD received Coggin's request for the appointment of a hearing examiner on August 25, 1999, within the fifteen day deadline.

9. On September 13, 1999, upon Culver's recommendation, the board voted to terminate Coggin's employment. The Board held no evidentiary hearing in connection with the termination. Instead, it relied upon its belief that Coggin had failed to file timely a request for a hearing examiner. No witnesses were called to testify concerning the proposed reasons for the termination. Other than informing Coggin of his right to request the appointment of a hearing examiner, the Board extended no opportunity to Coggin to challenge the reasons alleged to justify his proposed termination. At the time the Board terminated Coggin's employment, it had actual knowledge of Coggin's request for a hearing. Further, at the time the Board terminated Coggin's employment, it had actual knowledge of the dispute between Coggin and TEA concerning the issue whether Coggin had timely filed his request. Coggin had no notice that the Board would act to terminate his contract at the Board's meeting on September 13, 1999.

Background

10. Prior to March, 1999, all performance evaluations made in connection with Coggin's employment with LISD characterized his job performance as very good.

11. As an assistant superintendent, Plaintiff was responsible for LISD's Career and Technology Department. Previously, this program was known as LISD's Vocational Program.

12. The Career and Technology Department is unique because its teaching process generates revenue. For instance, the building in which the teaching is conducted has a soft drink machine which raises additional revenue for use by the Career and Technology Department.

13. Because of the uniqueness of the Career and Technology Department, Coggin was responsible for overseeing all activities other than those related to traditional curriculum selection and teaching. For clarity, the court will refer to the activities over which Coggin was responsible as the "business side" of the Career and Technology Department.

14. Dr. B. L. Davis ("Davis") was LISD's Superintendent for 1986, 1987, and 1988. Dr. Ron McMichael ("McMichael") succeeded Davis and served as LISD's Superintendent from 1988 through the school year ending in June, 1999. Davis and McMichael both gave Coggin very high ratings in all areas during their respective tenures as Superintendents.

15. During Davis' and McMichael's tenure as LISD Superintendents, the practice with respect to unacceptable or inadequate performance by employees holding positions similar to Coggin was to provide oral notice of any performance deficiency and counsel with the employee to change the conduct. If that procedure failed, then further action would be taken.

16. On March 1, 1999, Culver became LISD's Superintendent.

17. Upon his appointment, Culver met with the assistant superintendents and informed them that his practice was to give oral notice to assistant superintendents of any deficiencies in their performance. If the oral warning did not result in any changes, then Culver would provide the assistant superintendent a written notice of the performance deficiencies. If the written notice did not result in a change, something serious would be done. Culver advised

his subordinates that he did not like to fight, but if he got in a fight, he would fight to win.

Audit

18. On April 14, 1999, Culver handed Coggin a letter bearing that same date which informed Coggin that a "routine audit" of the departments on the Career & Technology Campus found numerous deficiencies in the management of the departments. Culver concluded that the information revealed by the audit constituted "grounds for good cause for possible disciplinary action against [Coggin], including termination. . . ." Culver also instructed Coggin to address in writing each of the issues raised in the letter no later than April 21, 1999. Culver advised Coggin that if the responses were unsatisfactory Culver would recommend disciplinary action to the Board, including possible termination of Plaintiff's contract. However, when Coggin acknowledged receipt of the letter on April 14, he signed a statement indicating that he had ten working days to present a written response. Coggin's response, therefore, was due on April 28, 1999.

19. On April 14, 1999, Culver and Coggin engaged in a brief discussion concerning the contents of Culver's April 14th letter.

20. Culver first became motivated to seek Coggin's termination when he began receiving results of the internal audit, but before March 23, 1999, the date the audit was completed.

21. There were two inconsistent reasons given for why the audit was initiated and no explanation for the discrepancy.

22. Prior to March, 1999, the only audits of the Career and Technology Department (and, formerly, the Vocational Department) were conducted annually by independent auditors. As a part of these independent audits, audits were performed of the Career and Technology Department. No independent auditor ever identified any inadequacies or deficiencies in the manner in which Coggin supervised the business side of the Career and Technology Department.

23. For several years prior to the 1999 school year, Doris McQueen ("McQueen"), LISD's Business Manager, oversaw the business side of the Career and Technology Department. Subsequently, Mike Albritton ("Albritton"), Assistant Superintendent for Business Services, oversaw the business side of the Career and Technology Department.

24. With respect to his performance related to the business side of the Career and Technology Department, Coggin, in good faith, followed the practices and procedures as he understood them based upon written and oral advice and communication from McQueen and Albritton.

25. At no time prior to March, 1999 did McQueen or Albritton ever advise Coggin that his practices or procedures or the conduct of the business side of the Career and Technology Department were in any way improper or inadequate.

26. The findings in the audit report dated March 23, 1999, represent the first time that any inadequacies had been identified to Coggin.

27. Coggin did not see or receive the audit report of March 23, 1999 until after his meeting with Superintendent Culver on April 14, 1999. No oral notice had been given to Coggin that LISD Administration considered his department to be inadequate or deficient prior to April 14, 1999.

28. Culver did not deliver to Coggin a copy of the audit report at the time he handed Coggin the April 14th letter.

29. Coggin received his actual copy of the March 23 audit report on or about April 19, 1999, even though Coggin is listed as one of the three addressees on the report.

30. All of the inadequacies identified in the March 23 audit report resulted from the practices and procedures which had been followed by the Career and Technology Department for 30 years prior to the audit report.

31. Coggin believed in good faith that he had been complying with all of the established practices and procedures of LISD prior to receiving Superintendent Culver's letter of April 14, 1999.

32. All of the inadequacies identified by the audit report of March 23, 1999, could have been corrected by appropriate training.

33. Coggin demonstrated that he was ready, willing, and able to comply with all changes necessary to correct the inadequacies identified in the March 23, 1999, audit report.

34. On April 28, 1999, Coggin delivered a written statement to Superintendent Culver's office explaining the matters identified by Culver in the April 14th letter. Additionally, Coggin scheduled an appointment with

Culver to meet on April 28, 1999 to discuss Coggin's response to the letter. Culver cancelled the meeting. Thereafter, no person at LISD met with Coggin to discuss his response which he delivered to Culver's office on April 28, 1999.

35. On two occasions between April 14 and April 29, Culver directed Janice Canion, Associate Superintendent of Curriculum and Instruction, to meet with Coggin and recommend that Coggin either retire or resign. Canion was Coggin's immediate supervisor. Canion understood that Culver would use all of the resources of the district to obtain Coggin's resignation. Canion believed that Culver wanted to get rid of Coggin. Culver wanted Canion to stress that this was a very serious matter, that LISD had started the process, and that LISD would finish the process of removing Coggin from employment. Canion understood that LISD would use the resources available to accomplish its goal of removing Coggin.

36. Coggin's written response to the audit report reasonably explained each and every inadequacy that Culver had identified to Coggin in the April 14th letter.

Harassment allegations – Downgraded from Sexual Harassment to Inappropriate and/or Improper Conduct or Contact with Female Employees

37. On April 30, 1999, Culver signed a letter prepared on the advice of his staff and legal counsel advising Coggin that "due to sexual harassment complaints, you are being placed on paid administrative leave effective April 30, 1999. . . ." After receipt of this letter, Coggin was never permitted back on any LISD campus.

38. The statement in the April 30th letter – "due to sexual harassment complaints" is inaccurate and misleading because no complaint had ever been received that described conduct which would constitute sexual harassment as defined and described in the Board Policy DFBA (Local) furnished with the letter.

39. There was no testimony by any witness, if accepted totally as true, that demonstrated that Coggin committed any conduct which amounted to sexual harassment.

40. In July, 1996, Julie Wersig, a teacher with LISD, complained about Coggin's conduct towards her. McMichael found that Wersig's complaint did not constitute sexual harassment. The testimony of Ms. Wersig at the trial did not establish any conduct by Coggin that would constitute sexual harassment. Coggin's response to Wersig's complaint was appropriate.

41. McMichael found that Coggin's response to Wersig's complaint was appropriate. After Coggin was made aware of Wersig's complaint, Coggin did not engage in any conduct which could arguably be characterized as harassment toward Wersig. The Court rejects for lack of credibility Wersig's trial testimony to the extent that she suggested that Coggin harassed her by undervaluing her job performance subsequent to her complaint as reflected in Defendant's Exhibit 57. Prior to April 30, 1999, other than the Wersig complaint, Coggin was never aware of any LISD employee being uncomfortable with any of his conduct, actions, or statements. At no time during LISD's investigation did anyone interview or seek information or explanation from Coggin as to the allegations of "sexual harassment complaints being received" as alleged in Culver's letter dated April 30, 1999. Between April 30,

1999 and July 15, 1999, no one conducting the investigation for LISD interviewed or sought information or explanation from Coggin with respect to the charge in the July 15, 1999 letter which stated that Coggin had "made comments to and/or had physical contact with female employees in a manner that was unprofessional and inappropriate for the workplace."

42. Albritton was Assistant Superintendent of Business Services. Albritton and Harvey Rayson ("Rayson"), LISD's Assistant Superintendent of Personnel Services, together with LISD's legal counsel, were delegated to investigate Coggin's conduct. At the time of trial, Rayson was no longer employed by LISD and Albritton was still serving in the capacity of Assistant Superintendent of Business Services. At the beginning of trial, counsel for LISD identified Albritton as someone who would testify, but at no time did Albritton offer any testimony.

43. Lisa Hunt ("Hunt") is currently an employee of LISD. Hunt had been Coggin's secretary for the 1993-1994 and the 1994-1995 school years. Hunt ceased working in this capacity in late July, 1995. Hunt was first contacted regarding the matters involved in this suit during the Albritton investigation in early May 1999. When Hunt was contacted, it was the first time she had made LISD aware of her complaint about alleged conduct by Coggin that occurred in July of 1995, approximately one year prior to Wersig's complaint.

44. In May, 1999, Barbara Prater ("Prater") was an employee of LISD who worked under Albritton's supervision. During Albritton's investigation in May 1999, Prater

first made LISD aware of her complaint of alleged misconduct by Coggin that occurred in 1997 and 1998 while she worked under Coggin's supervision.

45. At the time of trial, Gracie Lautaret ("Lautaret") was an employee of LISD working under Albritton's supervision. Lautaret is the person Culver identified as working in Albrittons' department who reported conduct that made her feel uncomfortable prior to Culver's April 30, 1999 letter.

46. Coggin's conduct alleged to have made Lautaret feel uncomfortable occurred in 1996. Lautaret complained that on one occasion Coggin put his fingers in her hair while she was sitting at her desk and tossed her hair or tousled it. Lautaret only told Albritton about Coggin's conduct in 1996 after Lautaret talked with Wersig regarding Wersig's complaint about Coggin. Albritton never brought Lautaret's comments to anyone's attention until Culver directed Albritton to investigate Coggin in late April, 1999.

47. Neither Prater, Hunt, nor Lautaret ever voiced any objection to Coggin regarding any conduct, comments, or other action by Coggin that allegedly made them feel uncomfortable.

48. Prater and Hunt had never complained to anyone with LISD about the alleged conduct that made them feel uncomfortable until Albritton's investigation in May 1999.

Interference with Investigation

49. In May, 1999, Coggin had a conversation with Ken Robertson ("Robertson") the evening immediately prior to Robertson's meeting with legal counsel representing LISD. Coggin's and Robertson's version of their conversation

were very different. There was not any corroborating evidence of either account of the conversation. Robertson remains employed by LISD.

50. Robertson has been employed by LISD as a teacher in the Career and Technology Department for approximately fifteen (15) years. Coggin was Robertson's immediate supervisor for Robertson's entire tenure at LISD.

Asbestos Abatement Program

51. Coggin complied with all posting requirements of the asbestos abatement program.

52. Coggin did not keep in his files copies of all the asbestos postings.

53. In 1998, Coggin became aware that the failure to keep a copy of all the postings would be considered a deficiency in LISD's asbestos abatement program if an audit was performed by any outside governmental agency.

54. Coggin attempted, in good faith, to recreate the posting records using his recollection, notes, and other information available to him.

55. Coggin believed in good faith that using this process to re-create a permanent record would probably satisfy any audit requirement.

56. The testimony of LISD's witness established that an auditor would not be interested in the documents that had been re-created, but rather would be interested in the commitment to keep the records in order in the future.

57. Coggin left copies of the re-created records and his notes in his office when he left campus on April 30, 1999.

58. Prior to the receipt of Culver's July 15, 1999 letter, Coggin never received any notice with respect to the following contents of the July 15th letter:

> 3. You have impeded, obstructed, and/or interfered with the Longview ISD's investigation of your conduct by directing Ken Robertson, a subordinate to withhold information and/or not to cooperate with the district's investigation of your conduct. Your communication with Ken Robertson violated the lawful directive of Superintendent Arthur Culver dated April 30, 1999, that you refrain from retaliating against any school district employee whom you feel may become a potential witness against you.
>
> The conduct set out in number 3 constitutes good cause for proposed termination and/or a violation of the Code of Ethics and Standard Practices for Texas Educators as set forth in the Employee Standards of Conduct for the Longview ISD, specifically Principle III Standards 4, 6 and 7.
>
> 4. On or about a date in the summer of 1998 you made false entries in Longview ISD asbestos management records by directing your secretary to enter on school district records, after the fact, dates purporting to document the occurrence of certain events when said dates were arbitrarily and/or randomly selected.
>
> The conduct set out in number 4 constitutes good cause for proposed termination and/or a violation of the Code of Ethics and Standard Practices for Texas Educators as set forth in the Employee Standards of Conduct for the Longview ISD, specifically Principle I Standard 6 and Principle II Standard 5.

In the July 15th letter, there was no suggestion that a meeting was planned with Coggin to discuss the reasons for his proposed termination and at no time did anyone charged with the duty to investigate the above conduct interview or otherwise seek information from Coggin concerning the allegations made in the foregoing paragraphs.

59. Culver made no investigation of his own as to the reasons for Coggin's proposed termination, but instead relied upon his staff and legal counsel to provide him with the basis for sending the July 15, 1999 letter.

60. The second reason given in the July 15, 1999 letter as grounds for termination was the use of LISD's resources for personal advantage. The conduct supporting this allegation was in keeping with the long-established and accepted practice of LISD. The conduct was tacitly approved by Davis and McMichael, as well as those persons overseeing the business side of the Career and Technology Department including McQueen and Albritton. As the audit report indicated, this deficiency could have been corrected by appropriate training and Coggin demonstrated that he was ready, willing, and able to correct this as well as all other deficiencies noted in the March 23, 1999 audit report.

61. LISD failed to establish by a preponderance of the evidence that an unbiased hearing examiner or the Board acting as an unbiased tribunal would have found that good cause existed for the termination of Coggin's contract for the reasons stated in the July 15, 1999 letter, either singularly or collectively.

62. An unbiased hearing examiner or the Board acting as an unbiased tribunal would not have found that good

cause existed for the termination of the contract based upon the credible evidence produced by LISD at the trial of this cause. Had Coggin received due process, he would not have been terminated.

63. Coggin acted as a reasonable person following termination and LISD failed to establish, by a preponderance of the evidence, that he failed to mitigate his damages.

64. The most likely employment for Coggin for the remainder of his professional career is that of a teacher.

65. The action of LISD in denying Coggin due process of law as guaranteed to him by the Fourteenth Amendment of the United States Constitution has severely impacted his ability to obtain future employment in a comparable position with any school district in the state of Texas.

66. The denial of procedural due process was a direct cause of the mental anguish suffered by Coggin. The amount of money necessary to reasonably compensate Coggin for mental anguish suffered as a result of the denial of procedural due process is $17,500.

67. The amount of money paid now in cash that would reasonably compensate Coggin for his lost wages to date is $37,500. Front pay in an amount equal to two years salary is appropriate given the extraordinary circumstances surrounding this case. Reinstatement is not feasible. Front pay equal to two years salary is $136,094. The amount of money reasonably necessary to compensate Coggin for his loss of medical insurance benefits is $4500. The amount of money reasonably necessary to compensate Coggin for his loss of retirement contributions over the next two years is $20,000. The total amount of pecuniary damages suffered by Coggin from LISD's denial of due process is $193,549.

68. A summary of the time line of some significant events in this case is as follows:

March 1, 1999	Culver begins his duties as Superintendent
Early March, 1999	Culver meets with staff, including Coggin
Early March, 1999	In-house audit of Career and Technology Department by Ms. Bane begins
March 23, 1999	Ms. Bane delivers 16 page audit report to Culver
April 14, 1999	Culver hands Coggin a 2 page letter of same date giving the results of Culver's review of the audit
April 19, 1999	Coggin obtains a copy of the audit from Albritton while working on written response to Culver's April 14 letter
April 14-29, 1999	On two occasions during this time period Culver directs Canion to meet with Coggin to attempt to obtain Coggin's agreement to resign or retire
April 28, 1999	Coggin delivers written response to Culver's April 14 letter
April 28, 1999	Culver's schedule prevents him from meeting with Coggin at the appointed time to discuss Coggin's response

Prior to April 30, 1999	Culver is made aware of Wersig's July 1996 complaint and Lautaret complaint to Albritton which occurred at or about the time Wersig first complained
April 30, 1999	Culver's letter of that date reporting sexual harassment complaints and suspending Coggin with pay is delivered to Coggin
April 30-May 5, 1999	Albritton approaches Prater, Hunt, and Wersig about testifying in this case
May 1999	Robertson phone conversation with Coggin; Robertson meets with LISD legal counsel
June 23, 1999	Coggin is relieved of duties in asbestos program with corresponding reduction of extra compensation
July 15, 1999	Letter to Coggin advising that Culver has recommended to the Board termination of Coggin's contract
August 12, 1999	Coggin receives Culver's July 15 letter
August 24, 1999	Coggin requests hearing by depositing a written request in the mail
August 25, 1999	LISD receives copy of Coggin's request for hearing
August 27, 1999	15 days after Coggin received July 15 letter

August 30, 1999	TEA receives Coggin's request to appoint a hearing examiner
September 2, 1999	TEA advises Coggin that it will not appoint a hearing examiner because Coggin's request was not received until August 30
September 1999	Prior to September 13, LISD is aware of dispute between Coggin and TEA about the timeliness of Coggin's request for the appointment of a hearing examiner
September 13, 1999	LISD Board votes to terminate Coggin's contract

Any of the above findings of fact which is actually a conclusion of law shall be deemed a conclusion of law. Likewise, any of the conclusions of law stated below which is actually a finding of fact shall be deemed a finding of fact.

Conclusions of Law

1. The Court has jurisdiction over the parties and the subject matter of this case pursuant to 28 U.S.C. § 1331.

2. Venue is proper in this Court under 28 U.S.C. § 1391 because a substantial part of the events giving rise to Coggin's causes of action arose in the Eastern District of Texas.

3. A claim of the denial of due process, as guaranteed under the fourteenth amendment, is actionable under 42 U.S.C. § 1983.

4. A municipality or local governmental entity, such as an independent school district, may be held liable under § 1983 when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Dep't of Social Servs. of New York*, 436 U.S. 658, 694 (1978). "Thus, § 1983 municipal liability may be imposed when (1) the enforcement of a municipal policy or custom was (2) 'the moving force' of the violation of federally protected rights." 1B Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation: Claims and Defenses § 7.6 (3d ed. 1997) (quoting *City of Canton v. Harris*, 489 U.S. 378, 385-91, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)).

The Fifth Circuit has defined official policy as:

> A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the [district] . . . or by an official to whom the [district] ha[s] delegated policy-making authority; . . . .
>
> *Johnson v. Moore,* 958 F.2d 92, 94 (5th Cir. 1992).

5. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that an individual may not be deprived of certain substantive rights – life, liberty, and property – without constitutionally adequate procedures. U.S. CONST. amend. XIV. The constitutionally adequate procedures are notice and opportunity for a hearing appropriate to the nature of the case.

6. The Supreme Court has described the "root requirement" of the Due Process Clause as being "that an

individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie v. Connecticut*, 91 S.Ct. 780 (1971) (emphasis added).

7. An individual's interest in retaining his employment is crucial. As such, due process entitles a tenured public employee to a pre-termination hearing consisting of oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. *Cleveland Bd. of Ed. v. Loudermill*, 105 S.Ct. 1487, 1495 (1985).

8. A public employee with a property interest in his continued employment is entitled under the Fourteenth Amendment to the following minimum due process rights in connection with the termination of his employment: (1) to be advised of the cause of the termination in sufficient detail to permit him to show any error that may exist; (2) to be advised of the names and nature of the testimony of the witnesses against him; (3) to be afforded a meaningful opportunity to be heard in his own defense within a reasonable time and (4) before a tribunal that possesses some expertise and an apparent impartiality toward the charges. *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970); *see also Wells v. Dallas Ind. Sch. Dist.*, 793 F.2d 679, 682 (5th Cir. 1986); *Levitt v. University of Texas at El Paso*, 759 F.2d 1224, 1228 (5th Cir. 1985).

9. When published rules and regulations establish a particular statutory procedure for the termination of a teacher's employment, they may add to the constitutional minimum. If the failure to follow published rules and regulations causes the process to fall below the constitutional minimum, then such failure is actionable.

10. Under Texas law, the trustees of an independent school district constitute a body corporate. Tex. Ed. Code Ann. § 11.151(a) (Vernon 1996). The trustees as a body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district. Tex. Ed. Code Ann. § 11.151(b) (Vernon 1996). All powers and duties no [sic] specifically delegated by statute to the TEA are reserved to the trustees. *Id.* Texas law vests the board of trustees of an independent school district with the exclusive power and authority to discharge (or not to discharge) employees of a school district. Under the Texas Education Code, a local school board may terminate a term contract and discharge a teacher at any time for good cause as determined by the board. Tex. Ed. Code Ann. § 21.211 (Vernon 1996).

11. The Texas Education Code sets forth the process in this state relating to the termination of a teacher.

12. Under the Texas Education Code, a teacher who has received notice of his or her proposed termination must file a written request for a hearing with the commissioner of education for the State of Texas not later than the 15th day after the date the teacher receives written notice of the proposed action. The teacher must also provide the district with a copy of the request. Tex. Ed. Code Ann. § 21.253 (Vernon 1996).

13. Tex. Ed. Code § 21.301 states "[d]isputes under the school laws of Texas, and specifically disputes arising under Texas Education Code, Chapter 21, are subject to appeal to the Commissioner of Education." Section 21.301 does not address the situation where the TEA, for whatever reason, declines to assign a hearing examiner. The state law review procedures provided under the Texas

Education Code assume that a hearing examiner has held a hearing, made findings of fact, conclusions of law, and a recommendation for relief. In addition, § 21.301 assumes that a school board has taken action upon a hearing examiner's recommendation. The terms of § 21.301, *et seq.* do not apply to the commissioner's failure to appoint a hearing examiner.

14. The mailbox rule applies to § 21.253.

15. Coggin timely filed his request for a hearing.

16. LISD, in terminating Coggin without a hearing, violated his right to procedural due process.

17. Coggin would not have been terminated had he received due process. LISD has failed to carry its burden of proving that, despite the failure to afford due process, it would have terminated Coggin's employment anyway. Good cause did not exist for Coggin's termination. Good cause is a two-pronged test defined as (1) the failure to perform as an ordinary employee would and (2) that such failure is of a serious nature. *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572 (Tex. App. – Houston [1st Dist.] 1992, no writ); *see also Duncan v. Highland Park ISD,* Docket No. 085-R2-398 (Comm'r Educ. May 1998) (adopting second prong of test in termination cases).

18. Coggin is entitled to compensatory damages in the amounts set forth in the court's findings of fact.

Coggin shall submit a proposed judgment and application for attorney's fees in the manner detailed in the court's memorandum opinion issued today.

SIGNED this 16th day of May, 2000.

/s/ T. John Ward
T. JOHN WARD
UNITED STATES
DISTRICT JUDGE

Tex. Educ. Code Ann. §§ 21.201-21.260

SUBCHAPTER E. TERM CONTRACTS

§ 21.201. Definitions.

In this subchapter:

(1) "Teacher" means a superintendent, principal, supervisor, classroom teacher, counselor, or other full-time professional employee who is required to hold a certificate issued under Subchapter B or a nurse. The term does not include a person who is not entitled to a probationary, continuing, or term contract under Section 21.002, an existing contract, or district policy.

(2) "School district" means any public school district in this state.

(3) "Term contract" means any contract of employment for a fixed term between a school district and a teacher.

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§ 21.202. Probationary Contract Required.

Before a teacher may be employed under a term contract, the teacher must be employed under a probationary contract for the period provided by Subchapter C.

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§ 21.203. Employment Policies.

(a) The employment policies adopted by a board of trustees must require a written evaluation of each teacher at annual or more frequent intervals. The board must consider the most recent evaluations before making a

decision not to renew a teacher's contract if the evaluations are relevant to the reason for the board's action.

(b) The employment policies must include reasons for not renewing a teacher's contract at the end of a school year.

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§ 21.204. Term Contract.

(a) A term contract must be in writing and must include the terms of employment prescribed by this subchapter.

(b) The board of trustees may include in the contract other provisions that are consistent with this subchapter.

(c) Each contract under this subchapter is subject to approval by the board of trustees.

(d) The board of trustees shall provide each teacher with a copy of the teacher's contract with the school district and a copy of the board's employment policies.

(e) A teacher does not have a property interest in a contract beyond its term.

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§ 21.205. Term of Contract.

Once a teacher has completed the probationary contract period, the term of a contract under this subchapter may not exceed five school years.

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§ 21.206. Notice of Contract Renewal or Nonrenewal.

(a) Not later than the 45th day before the last day of instruction in a school year, the board of trustees shall notify in writing each teacher whose contract is about to expire whether the board proposes to renew or not renew the contract.

(b) The board's failure to give the notice required by Subsection (a) within the time specified constitutes an election to employ the teacher in the same professional capacity for the following school year.

(c) This section does not apply to a term contract with a superintendent.

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§ 21.207. Hearing Under Term Contract.

(a) If the teacher desires a hearing after receiving notice of the proposed nonrenewal, the teacher shall notify the board of trustees in writing not later than the 15th day after the date the teacher receives the notice of the proposed action. The board shall provide for a hearing to be held not later than the 15th day after the date the board receives the request for a hearing unless the parties agree in writing to a different date. The hearing must be closed unless the teacher requests an open hearing.

(b) The hearing must be conducted in accordance with rules adopted by the board. The board may use the process established under Subchapter F.

(c) At the hearing, the teacher may:

(1) be represented by a representative of the teacher's choice;

(2) hear the evidence supporting the reason for nonrenewal;

(3) cross-examine adverse witnesses; and

(4) present evidence.

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§ 21.208. Decision of Board.

(a) If the teacher does not request a hearing, the board of trustees shall:

(1) take the appropriate action to renew or not renew the teacher's contract; and

(2) notify the teacher in writing of that action not later than the 30th day after the date the notice of proposed nonrenewal was sent to the teacher.

(b) If the teacher requests a hearing, following the hearing the board of trustees shall:

(1) take the appropriate action to renew or not renew the teacher's contract; and

(2) notify the teacher in writing of that action not later than the 15th day after the date on which the hearing is concluded.

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§ 21.209. Appeal.

A teacher who is aggrieved by a decision of a board of trustees on the nonrenewal of the teacher's term contract may appeal to the commissioner for a review of the decision of the board of trustees in accordance with the provisions of Subchapter G. The commissioner may not substitute the commissioner's judgment for that of the board of trustees unless the board's decision was arbitrary, capricious, unlawful, or not supported by substantial evidence.

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§ 21.210. Resignation Under Term Contract.

(a) A teacher employed under a term contract with a school district may relinquish the teaching position and leave the employment of the district at the end of a school year without penalty by filing a written resignation with the board of trustees or the board's designee not later than the 45th day before the first day of instruction of the following school year. A written resignation mailed by prepaid certified or registered mail to the president of the board of trustees or the board's designee at the post office address of the district is considered filed at the time of mailing.

(b) A teacher employed under a term contract may resign, with the consent of the board of trustees or the board's designee, at any other time.

(c) On written complaint by the employing district, the State Board for Educator Certification may impose sanctions against a teacher who is employed under a term

contract that obligates the district to employ the person for the following school year and who:

(1) resigns;

(2) fails without good cause to comply with Subsection (a) or (b); and

(3) fails to perform the contract.

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§ 21.211. Termination or Suspension.

(a) The board of trustees may terminate a term contract and discharge a teacher at any time for:

(1) good cause as determined by the board; or

(2) a financial exigency that requires a reduction in personnel.

(b) For a good cause, as determined by the board, the board of trustees may suspend a teacher without pay for a period not to extend beyond the end of the school year:

(1) pending discharge of the teacher; or

(2) in lieu of terminating the teacher.

(c) A teacher who is not discharged after being suspended without pay pending discharge is entitled to back pay for the period of suspension.

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§ 21.212. Applicability of Subchapter to Superintendents.

(a) The board of trustees of a school district may choose to not renew the employment of a superintendent

employed under a term contract, effective at the end of the contract period. If a majority of the board of trustees determines that the term contract of the superintendent should be considered for nonrenewal, the board shall give the superintendent written notice, containing reasonable notice of the reason for the proposed nonrenewal, not later than the 30th day before the last day of the contract term.

(b) If the board of trustees fails to give notice of the proposed nonrenewal within the time specified by Subsection (a), the board of trustees shall employ the superintendent in the same professional capacity for the following school year.

(c) If the superintendent, not later than the 15th day after receiving notice of the board's proposed action, does not request a hearing with the board of trustees under Section 21.207, the board of trustees shall:

(1) take the appropriate action; and

(2) notify the superintendent in writing of the action not later than the 30th day after the date the board sends the notice of the proposed nonrenewal.

(d) The board of trustees shall adopt policies that establish reasons for nonrenewal. This section does not prohibit a board of trustees from discharging a superintendent for good cause during the term of a contract.

(e) A superintendent employed under a term contract may leave the employment of the district at the end of a school year without penalty by filing a written resignation with the board of trustees. The resignation must be addressed to the board and filed not later than the 45th day before the first day of instruction of the following

school year. A superintendent may resign, with the consent of the board of trustees, at any other time.

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§ 21.213. Nonapplicability of Subchapter.

Except as provided by Section 21.202, this subchapter does not apply to a teacher employed under a probationary contract in accordance with Subchapter C or a continuing contract in accordance with Subchapter D.

SUBCHAPTER F. HEARINGS BEFORE HEARING EXAMINERS

§ 21.251. Applicability.

(a) This subchapter applies if a teacher requests a hearing after receiving notice of the proposed decision to:

(1) terminate the teacher's continuing contract at any time;

(2) terminate the teacher's probationary or term contract before the end of the contract period; or

(3) suspend the teacher without pay.

(b) This subchapter does not apply to:

(1) a decision to terminate a teacher's employment at the end of a probationary contract; or

(2) a decision not to renew a teacher's term contract, unless the board of trustees of the employing district has decided to use the process prescribed by this subchapter for that purpose.

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§ 21.252. Certification of Hearing Examiners.

(a) The State Board of Education, in consultation with the State Office of Administrative Hearings, by rule shall establish criteria for the certification of hearing examiners eligible to conduct hearings under this subchapter. A hearing examiner certified under this subchapter must be licensed to practice law in this state.

(b) The commissioner shall certify hearing examiners according to the criteria established under Subsection (a). A person certified as a hearing examiner or the law firm with which the person is associated may not serve as an agent or representative of:

(1) a school district;

(2) a teacher in any dispute with a school district; or

(3) an organization of school employees, school administrators, or school boards.

(c) The commissioner shall set hourly rates of compensation for a hearing examiner and shall set a maximum amount of compensation a hearing examiner may receive for a hearing.

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§ 21.253. Request for Hearing.

A teacher must file a written request for a hearing under this subchapter with the commissioner not later than the 15th day after the date the teacher receives

written notice of the proposed action. The teacher must provide the district with a copy of the request.

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§ 21.254. Assignment of Hearing Examiner.

(a) The commissioner shall maintain a list of the names of all persons who have been certified as hearing examiners. The list shall be initially prepared in a random order, and subsequent additions to the list shall be added chronologically.

(b) The commissioner shall assign the hearing examiner for a particular case by selecting the next person named on the list who resides within reasonable proximity to the district as determined by the commissioner. The commissioner may not change the order of names once the order is established under this section, except that once each hearing examiner on the list has been assigned to a case, the names shall be randomly reordered.

(c) The commissioner shall assign a hearing examiner to a pending case not later than the 10th business day after the date on which the commissioner receives the request for a hearing. When a hearing examiner has been assigned to a case, the commissioner shall immediately notify the parties.

(d) Either party is entitled to reject the assigned hearing examiner for cause. A rejection must be in writing and filed with the commissioner not later than the third day after the date of notification of the hearing examiner's assignment. If the commissioner determines the party has good cause to reject the hearing examiner, the commissioner shall assign another hearing examiner as provided

by Subsection (b). If neither party makes a timely rejection, the assignment is final.

(e) After the teacher receives the notice of the proposed action, the parties by agreement may select a person who is not certified to serve as a hearing examiner. A person selected under this subsection must be licensed to practice law in this state. If the parties agree on a hearing examiner before the teacher files a request for hearing under Section 21.253, the request shall include the name of the hearing examiner selected. If the parties agree on a hearing examiner after the teacher files the request for hearing, the teacher shall promptly notify the commissioner in writing of the name of the hearing examiner.

(f) After the teacher receives the notice of the proposed action, the teacher and the district may agree in writing that the decision of the hearing examiner will be final and nonappealable on all or some issues.

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§ 21.255. Hearings Before Hearing Examiner.

(a) The hearing examiner may issue subpoenas at the request of either party for the attendance of witnesses and the production of documents at the hearing and may administer oaths, rule on motions and the admissibility of evidence, maintain decorum by closing the hearing or taking other appropriate action, schedule and recess the proceedings, and make any other orders as provided by rules adopted by the commissioner. The hearing examiner may issue a subpoena for the attendance of a person who is not an employee of the district only if the party requesting

the issuance of the subpoena shows good cause for the subpoena. The hearing must be held within the geographical boundaries of the school district or at the regional education service center that serves the district.

(b) A hearing examiner may allow either party to take one or more depositions or to use other means of discovery before the hearing. The hearing examiner, at the request of either party, may issue subpoenas for the attendance of witnesses and the production of documents at the deposition. The hearing examiner may issue a subpoena for the deposition of any person who is not an employee of the district only if the party requesting the issuance of the subpoena shows good cause for the subpoena. The deposition must be held within the geographical boundaries of the school district or at the regional education service center that serves the district.

(c) A procedure specified in this section may be changed or eliminated by written agreement of the teacher and the school district after the teacher receives the written notice of the proposed action.

(d) If the hearing examiner is unable to continue presiding over a case at any time before issuing a recommendation or decision, the parties shall request the assignment of another hearing examiner under Section 21.254 who, after a review of the record, shall perform any remaining functions without the necessity of repeating any previous proceedings.

(e) The school district shall bear the cost of the services of the hearing examiner and certified shorthand reporter at the hearing and the production of any original hearing transcript. Each party shall bear its respective

costs, including the cost of discovery, if any, and attorney's fees.

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§ 21.256. Conduct of Hearing.

(a) A hearing under this subchapter must be private unless the teacher requests in writing that the hearing be public, except that a hearing examiner may close a hearing if necessary to maintain decorum.

(b) The hearing is not subject to Chapter 2001, Government Code.

(c) At the hearing, a teacher has the right to:

(1) be represented by a representative of the teacher's choice;

(2) hear the evidence on which the charges are based;

(3) cross-examine each adverse witness; and

(4) present evidence.

(d) The Texas Rules of Civil Evidence apply at the hearing. A certified shorthand reporter shall record the hearing.

(e) The hearing shall be conducted in the same manner as a trial without a jury in a district court of this state. The hearing examiner's findings of fact and conclusions of law shall be presumed to be based only on admissible evidence.

(f) To protect the privacy of a witness who is a child, the hearing examiner may:

(1) close the hearing to receive the testimony of the witness; or

(2) order that the testimony or a statement of the witness be presented using the procedures prescribed by Article 38.071, Code of Criminal Procedure.

(g) An evaluation or appraisal of the teacher is presumed to be admissible at the hearing.

(h) At the hearing, the school district has the burden of proof by a preponderance of the evidence.

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§ 21.257. Recommendation of Hearing Examiner.

(a) Not later than the 45th day after the date on which the commissioner receives a teacher's written request for a hearing, the hearing examiner shall complete the hearing and make a written recommendation that:

(1) includes findings of fact and conclusions of law; and

(2) may include a proposal for granting relief.

(b) The proposed relief under Subsection (a)(2) may include reinstatement, back pay, or employment benefits but may not include attorney's fees or other costs associated with the hearing or appeals from the hearing.

(c) The parties may agree in writing to waive the right to a recommendation by the date prescribed by Subsection (a).

(d) The hearing examiner shall send a copy of the recommendation to each party, the president of the board of trustees, and the commissioner.

(e) A hearing examiner who fails to timely issue a written recommendation or decision may not be assigned by the commissioner to conduct additional hearings for a period not to exceed one year.

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§ 21.258. Consideration of Recommendation by Board of Trustees or Board Subcommittee.

(a) The board of trustees or a subcommittee designated by the board shall consider the recommendation and record of the hearing examiner at the first board meeting for which notice can be posted in compliance with Chapter 551, Government Code, following the issuance of the recommendation. The meeting must be held not later than the 20th day after the date that the president of the board receives the hearing examiner's recommendation and the record of the hearing.

(b) At the meeting, the board of trustees or board subcommittee shall consider the hearing examiner's recommendation and shall allow each party to present an oral argument to the board or subcommittee. The board by written policy may limit the amount of time for oral argument. The policy must provide equal time for each party.

(c) The board of trustees or board subcommittee may obtain advice concerning legal matters from an attorney who has not been involved in the proceedings.

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§ 21.259. Decision of Board of Trustees or Board Subcommittee.

(a) Not later than the 10th day after the date of the board meeting under Section 21.258, the board of trustees or board subcommittee shall announce a decision that:

(1) includes findings of fact and conclusions of law; and

(2) may include a grant of relief.

(b) The board of trustees or board subcommittee may adopt, reject, or change the hearing examiner's:

(1) conclusions of law; or

(2) proposal for granting relief.

(c) The board of trustees or board subcommittee may reject or change a finding of fact made by the hearing examiner only after reviewing the record of the proceedings before the hearing examiner and only if the finding of fact is not supported by substantial evidence.

(d) The board of trustees or board subcommittee shall state in writing the reason and legal basis for a change or rejection made under this section.

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§ 21.260. Recording of Board Meeting and Announcement.

A certified shorthand reporter shall record the oral argument under Section 21.258 and the announcement of the decision under Section 21.259. The school district shall bear the cost of the services of the certified shorthand reporter.

Tex. Educ. Code Ann. § 7.057

§ 7.057. Appeals.

(a) Except as provided by Subsection (e), a person may appeal in writing to the commissioner if the person is aggrieved by:

(1) the school laws of this state; or

(2) actions or decisions of any school district board of trustees that violate:

(A) the school laws of this state; or

(B) a provision of a written employment contract between the school district and a school district employee, if a violation causes or would cause monetary harm to the employee.

(b) Except as provided by Subsection (c), the commissioner, after due notice to the parties interested, shall hold a hearing and issue a decision without cost to the parties involved. In conducting a hearing under this subsection, the commissioner has the same authority relating to discovery and conduct of a hearing as a hearing examiner has under Subchapter F, Chapter 21. This section does not deprive any party of any legal remedy.

(c) In an appeal against a school district, the commissioner shall issue a decision based on a review of the record developed at the district level under a substantial evidence standard of review. A school district's disclosure of the record to the commissioner under this subsection is not an offense under Section 551.146, Government Code.

(d) A person aggrieved by an action of the agency or decision of the commissioner may appeal to a district court in Travis County. An appeal must be made by serving the commissioner with citation issued and served in the manner provided by law for civil suits. The petition must state the action or decision from which the appeal is taken. At trial, the court shall determine all issues of law and fact, except as provided by Section 33.081(g).

(e) This section does not apply to:

(1) a case to which Subchapter G, Chapter 21, applies; or

(2) a student disciplinary action under Chapter 37.

(f) In this section:

(1) "Record" includes, at a minimum, an audible electronic recording or written transcript of all oral testimony or argument.

(2) "School laws of this state" means Title I and this title and rules adopted under those titles.

Tex. Govt. Code Ann. § 2001.176

§ 2001.176. Petition Initiating Judicial Review.

(a) A person initiates judicial review in a contested case by filing a petition not later than the 30th day after the date on which the decision that is the subject of complaint is final and appealable.

(b) Unless otherwise provided by statute:

(1) the petition must be filed in a Travis County district court;

(2) a copy of the petition must be served on the state agency and each party of record in the proceedings before the agency; and

(3) the filing of the petition vacates a state agency decision for which trial de novo is the manner of review authorized by law but does not affect the enforcement of an agency decision for which another manner of review is authorized.

(c) A Travis County district court in which an action is brought under this section, on its own motion or on motion of any party, may request transfer of the action to the Court of Appeals for the Third Court of Appeals District if the district court finds that the public interest requires a prompt, authoritative determination of the legal issues in the case and the case would ordinarily be appealed. After filing of the district court's request with the court of appeals, transfer of the action may be granted by the court of appeals if it agrees with the findings of the district court concerning the application of the statutory standards to the action. On entry of an order by the court of appeals granting transfer, the action is transferred to the court of appeals for decision, and the agency decision

in the contested case is subject to judicial review by the court of appeals. The administrative record and the district court record shall be filed by the district clerk with the clerk of the court of appeals. The court of appeals may direct the district court to conduct any necessary evidentiary hearings in connection with the action.

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In The
Supreme Court of the United States

LONGVIEW INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

RANDALL COGGIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This amicus curiae brief is submitted on behalf of the Texas Association of School Boards Legal Assistance Fund[1] ("TASB LAF") in support of Longview Independent School District's ("Longview ISD" or "District") Petition for Writ of Certiorari. Petitioner Longview ISD and Respondent Randall Coggin ("Coggin") have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Texas Association of School Boards Legal Assistance Fund is an association of over 800 Texas public school districts. Established in 1980, the mission of TASB LAF is to provide amicus curiae briefs and other litigation support to member school districts involved in litigation of national and statewide importance. TASB LAF is governed by officers of the Texas Association of School Boards (an association of approximately 1,045 member public school districts), the Texas Association of School Administrators (an association of public school district superintendents and other school administrators), and the Texas Council of School Attorneys (an association of school law attorneys who together represent more than 90 percent of the public school districts in Texas).

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[1] This brief was authored by outside counsel for TASB LAF. No person or entity other than TASB LAF's members made a monetary contribution to this brief's preparation or submission. Although Petitioner Longview ISD is a member of TASB LAF, Petitioner has not made any direct financial contribution to this brief's preparation or submission.

TASB LAF is concerned that the Fifth Circuit has abandoned the long-settled requirements of pre-termination procedural due process. Further, it is concerned that the court's decision is based on faulty analysis of state law that far exceeds the scope of the issues raised and briefed by the parties. TASB LAF submits this brief as a friend of the Court to illustrate the ramifications of the Fifth Circuit's departure from this Court's established precedent.

Certiorari review is needed not only to correct the Fifth Circuit's erroneous analysis of the constitutional requirements of pre-termination due process, but also to clarify that a § 1983 claim for denial of procedural due process can be established only against the entity that denied the opportunity for a proper hearing. Intervention by this Court is necessary to prevent federal courts in the Fifth Circuit and beyond from applying the erroneous analysis of *Coggin v. Longview Independent School District*, 337 F.3d 459 (5th Cir. 2003) (en banc), in future lawsuits involving the termination of public employees.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's en banc majority opinion in this case misapplies well established procedural due process analysis and creates a dangerous and unwarranted precedent that places all public school districts – indeed all public employers – at risk of additional liability for terminating certain public employees. By creating a theory of "timing causation," whereby Longview ISD is deemed to have violated Coggin's Fourteenth Amendment rights by terminating him before his opportunity to seek state court judicial review had expired, the court has improperly reconfigured the constitutional standard for pre-deprivation due process. The timing causation analysis crafted by the

en banc majority represents a three-layered compound error: The basis for the Fifth Circuit's holding is 1) contrary to existing precedents governing pre-termination procedural due process, 2) based on legal theories not presented by the pleadings, record, and earlier rulings of the case, and 3) unsupported by Texas law. The en banc majority so far departs from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its supervisory power.

This case also presents the Court with the critical opportunity to clarify the nature of appropriate § 1983 causation analysis in multiple state actor scenarios such as that set out by the provisions of the Texas Education Code at issue in this case. In this age of heightened accountability for public schools, the Texas Legislature has sought to create a more streamlined system to resolve educator employment disputes quickly and fairly, in the interests of both public employer and public employee. This case is appropriate for review on writ of certiorari in order to vindicate the substantial public policy interests of school districts and other public employers nationwide in maintaining their ability to act with certainty in dismissing unsatisfactory employees when the public good so requires.

ARGUMENT

A. THE EN BANC MAJORITY OF THE FIFTH CIRCUIT COMMITTED COMPOUND ERRORS THAT YIELD A FLAWED PROCEDURAL DUE PROCESS ANALYSIS AND OVERREACHING APPELLATE REVIEW.

Having determined to rehear this case en banc following a split panel decision, the Fifth Circuit proceeded to analyze the nature of Randall Coggin's Fourteenth

Amendment procedural due process rights in a manner unsupported by the precedents of this Court. As set forth below, the resulting opinion of the narrow en banc majority is flawed by multiple, compounding layers of analytical error and judicial overreaching, the cumulative effect of which calls for this Court's exercise of its supervisory power.

1. The En Banc Majority's Analysis Upends the Well Established Balance Between Employer and Employee Interests in Pre-Termination Procedural Due Process.

The first layer of error by the en banc majority is that it completely alters the careful balance of competing interests that this Court has struck in its procedural due process jurisprudence. The modern analysis of how much process is due to an employee who is proposed for termination was set forth in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, this Court weighed the competing interests presented in termination of a public employee, and developed a balanced, logical, and easily applicable standard. Unfortunately, the Fifth Circuit has taken this carefully developed, balanced standard and turned it on its head, tilting the scale totally in favor of the employee, and eliminating the consideration of the public employer's interests.

As discussed in *Loudermill*, a public employee with tenure or a currently effective contract has a vested property interest in retaining employment. *Id.* at 542. Certainly the burdens and risks of unemployment are an important consideration, and due process acts as a means to ensure that an employee is exposed to those risks only when appropriate. These considerations led to the primary holding of the case, which is that the employee is entitled

to pre-termination notice of the charges, and a meaningful *opportunity* to respond to those charges.[2] This gives the employee an opportunity to point out factual disputes, to present countervailing arguments, and to identify issues that may indicate the public employer has made a mistake. *Id.* at 546.

The *Loudermill* majority also weighed the public employer's interest in immediate termination. The Court concluded that a minimal pre-termination procedure "would impose neither a significant administrative burden nor intolerable delays." *Id.* at 544. The due process requirements of notice and an opportunity to be heard will not result in "significant administrative burden" or "intolerable delays" because this Court limited the type or amount of process due. The pre-termination hearing does not have to be "elaborate." *Id.* at 545. Something less than a "full evidentiary hearing" is all that is required by the U.S. Constitution. This pre-termination hearing does not have to be designed to "definitively resolve the propriety of the discharge," but should merely serve as an "initial check against mistaken decisions." *Id.* Based on these limitations on the nature of pre-termination due process requirements, this Court correctly concluded that "[t]o require more than this prior to termination would intrude

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[2] Well established precedent permits the state to erect reasonable procedural requirements for triggering the right to an adjudicatory due process hearing. These requirements can take the form of statutes of limitation or filing fees. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 439 (1982); *Boddie v. Connecticut*, 401 U.S. 371 (1971). Indeed, *Logan* notes that the state affords all the process that is due "when it terminates a claim for failure to comply with a reasonable procedural rule. . . . " *Logan*, 455 U.S. at 439. Thus, an employee can effectively waive the right to a pre-deprivation hearing by failing to comply with the State's procedural rules for triggering a hearing, such as occurred in the case at bar.

to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546.

In the case *sub judice*, the en banc majority takes these simple rules through the looking glass and develops a topsy-turvy analysis that confuses and entwines state law procedural requirements with the requirements of the U.S. Constitution. It eradicates any consideration for the interest of the public employer. Significantly, the en banc majority holds that the school board acted prematurely and therefore cut off Coggin's opportunity to seek judicial review of the Commissioner of Education's ("Commissioner") determination that no hearing examiner would be appointed. Pet'r App. 9.[3] By requiring Longview ISD to wait an additional 30 days to take final action on Coggin's employment, the court turns the pre-termination process into more than an initial check against erroneous decisions as required by *Loudermill*. This expanded timeframe fails utterly to recognize the District's interest in taking prompt, decisive employment actions.

Although it may seem at first blush that this newly imposed 30-day waiting period would not significantly alter the balance between the competing interests of the public employer and the public employee, closer analysis of the Fifth Circuit majority's final effort at resolving this case reveals a much more onerous burden on the employer. In particular, the en banc majority does nothing to limit the District's "waiting period" to 30 days. Under Texas' statutory scheme, as in other state jurisdictions, judicial review of a final decision of a state agency may take

[3] All citations herein to the district court and Fifth Circuit opinions in this case reference the relevant pages of Petitioner Longview ISD's Appendix.

months or years. Texas law allows an appeal as of right to the intermediate Court of Appeals, and allows for discretionary review by the Texas Supreme Court.

The en banc majority does not take these potential subsequent appeals into account; it merely states that Longview ISD should have waited until the end of the 30-day period in which the majority concluded Coggin could seek judicial review of the Commissioner's determination. Left unresolved is this: What options would have existed for Longview ISD if Coggin had filed such a legal challenge? Is the District obligated to wait until a final decision is reached by the courts? At what stage of the judicial review of the agency's action is the District free to begin termination proceedings? It is possible that if Coggin had filed an appeal within the timeframe allowed by the Texas Administrative Procedure Act ("Texas APA"), a final determination on the propriety of the Commissioner's determination might not be made for years. Is the District obligated to keep Coggin employed for the duration of this process?

This potential for indefinite waiting on the final resolution of judicial review *does* represent a "significant administrative burden" and an "intolerable delay." To force a public employer to wait to terminate an unsatisfactory employee until all judicial challenges have been resolved is an unwarranted intrusion on the government's interest. Because the en banc Fifth Circuit adopts this new and potentially debilitating standard for procedural due process, this Court should grant Longview ISD's Petition for Writ of Certiorari and restore *Loudermill*'s balance and logic to the pre-termination due process analysis for public employees.

2. The En Banc Majority Improperly Decided the Case on Grounds Not Raised Below and Therefore Denied the District the Opportunity to Defend the Case.

Underlying the en banc majority's unprecedented reconfiguration of the *Loudermill* standard for pre-termination due process is its second layer of error – basing its new due process causation analysis on a legal theory that was never raised in this case. The panel in this case concluded that the District's *inaction* – that is, the fact that it failed to re-notice its proposed termination of Coggin or to conduct its own evidentiary hearing – was the "moving force" in the violation of Coggin's procedural due process rights. Pet'r App. 65-67. However, the en banc majority's analysis is entirely different, developing for Coggin a theory of timing causation under which the District's action to terminate Coggin was the "sole cause" of the violation, because its swift action allegedly denied Coggin his right to state court judicial review under Texas Education Code § 7.057(d) (Vernon Supp. 2004). Pet'r App. 9.

It is undisputed that Coggin himself never invoked section 7.057 and never argued that his procedural due process rights were violated because Longview ISD effectively denied his right to appeal under this provision. In fact, the district court expressly noted that it did not consider this statutory provision, because it had not been raised by the parties. Pet'r App. 103 & n. 14. Nor did any party, in its briefing to the Fifth Circuit, refer to or rely on this statute in any manner adequate to argue its relevance to this case. Pet'r App. 20 & nn. 39, 40 (Jones, J., dissenting). Because the right to, and the statutory basis for, state court judicial review were not argued before the district court or the panel, no party had invoked the Texas APA to derive a timeframe for such review. Nor had any party

advanced any argument regarding whether and how such a right of judicial review would impact Longview ISD's ability to proceed to act on Coggin's proposed termination.

As the six dissenters point out, in a series of three opinions, the en banc majority's approach is contrary to well established principles of appellate review, recognized by this Court and by the Fifth and other Circuits. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *United States v. Brace*, 145 F.3d 247, 255-56, 261 (5th Cir. 1998). As these precedents make clear, review of an issue or theory not raised by the parties in the district court not only renders meaningless the adversary process, but it denies the other parties an opportunity to present evidence or legal argument tailored to the issues to be decided.

Here, the en banc majority, without explanation, has departed from this precedent, thus creating a new legal theory for Coggin and denying Longview ISD any opportunity to have defended its case on these issues. There is not even an attempt to bring this departure within the limited "extraordinary circumstances" exception to the rule. *See Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999); *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996). Indeed, the majority addresses Judge Jones' dissent[4] with only the thin thread that the ultimate issue in the case was which

[4] While the en banc majority refers only to the dissent authored by Judge Jones, *see* Pet'r App. 19 (Jones, J., dissenting), Judge Garza's dissent also criticizes this fundamental flaw in the majority's analysis. Pet'r App. 27 (Garza, J., dissenting). Judge Jolly's dissent, while emphasizing the utter speculation of the majority regarding the effect of the District's termination decision on Coggin's right to judicial review, also notes the majority's wholly new theory of the case. *See* Pet'r App. 15 (Jolly, J., dissenting).

state actor had caused the violation of Coggin's procedural due process rights, and therefore that it was simply exercising its duty "'to enunciate the law on the record facts.'" Pet'r App. 14-15 n. 35. Under this suggested standard, however, the rule of *Singleton*, *Brace* and similar cases is completely eviscerated; in order to justify deciding a case on a wholly different issue or theory never raised before the lower courts, an appellate court need only point to some topical connection between its newfound theory and the ultimate issues of the case.

The result of the Fifth Circuit's overreaching is that Longview ISD was effectively denied any notice that its actions were being challenged on a causation theory based on the effect of the timing of its decision, vis-a-vis Coggin's ability to seek judicial review. Had the District been made aware of this theory, it would have had the opportunity to develop its case differently, in a manner designed to limit the nature and the extent of any remedies to which Coggin might be entitled if any violation were found. The en banc majority improperly based its holding on a legal theory not developed by the parties or decided by the district court or the panel in this case. This error, exacerbated by the court's analytical errors regarding pre-termination procedural due process analysis and Texas law, leaves a dangerous precedent from an en banc court of appeals, and therefore calls for review.

3. The En Banc Majority's Incorrect Speculation Regarding the Applicability and Operation of State Law Cannot Support Its Assumption that Coggin's Right to Judicial Review Was Mooted or Prematurely Cut Off by Longview ISD's Action.

Finally, the en banc majority's third layer of error – its unsupported misapplication of state law – further infects

its analysis and produces a conclusion that calls for granting the District's Petition for Writ of Certiorari. Assuming arguendo that Coggin was entitled, pursuant to Texas Education Code § 7.057(d), to judicial review of the Commissioner's decision not to appoint a hearing examiner to hear his case, the en banc majority's new theory of timing causation is not properly grounded in the Texas APA or otherwise supported by state law. Moreover, the en banc majority has offered no analysis to support its conclusory assumption that Longview ISD's termination of Coggin somehow precluded his ability to seek that judicial review in a proper forum.

Neither Texas' Education Code in particular, nor its administrative laws more generally, support the majority's borrowing, for purposes of section 7.057(d), the 30-day timeframe within which an aggrieved party may seek judicial review of a final decision of a state agency in a contested case. *See* TEX. GOV'T CODE ANN. §§ 2001.171, 2001.176 (Vernon 2000). The portions of the Education Code outlining the process due in mid-year educator terminations expressly provide that the Texas APA does not apply to these administrative proceedings. *See* TEX. EDUC. CODE ANN. § 21.256(b) (Vernon 1996) (governing the initial hearing conducted by an independent examiner, if timely requested); *id.* § 21.301(e) (Vernon Supp. 2004) (governing an appeal to the Commissioner of a school board's decision under § 21.259); *Moses v. Dallas Indep. Sch. Dist.*, 12 S.W.3d 168, 171 (Tex. App. – Dallas 2000, no pet.).

While the en banc majority is content to assume that the Texas APA's general 30-day time limit applies in this context, its sparse two-footnote analysis does not support this assumption. Pet'r App. 8-9 & nn. 20, 21. Its reliance on case law emphasizing that, even outside the scope of the APA, an aggrieved party must seek judicial review within a reasonable time does not inform the issue in this case,

namely whether Longview ISD was precluded from terminating Coggin's employment until he had had a "reasonable" time to appeal the Commissioner's denial of hearing.

More importantly, even assuming that the Texas APA does apply and therefore that Coggin had 30 days within which to appeal the Commissioner's denial of his hearing request, the en banc majority offers nothing to support the conclusion compelled by its new theory of timing causation, that the Longview ISD's decision to terminate Coggin prior to the expiration of that 30 days somehow cut off or mooted his opportunity for judicial review in state court.[5] The critical fact of this case is that Coggin *never* filed such a petition for judicial review, under the Texas APA or otherwise. If he had, he may have been able to obtain injunctive relief ordering that the Commissioner assign a hearing examiner so that his case could be considered in accordance with the procedures outlined in Texas Education Code Chapter 21, and he may have been able to obtain injunctive relief ordering the District to stay its termination decision pending those proceedings. *See* Pet'r App. 16-18 (Jolly, J., dissenting). The en banc majority's speculation, under its newly created theory of timing causation, that Coggin was denied judicial review because of the District's decision is lacking any support as a matter of law.

Unfortunately, the Fifth Circuit's en banc majority affirmed the lower court in this case for reasons 1)

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[5] Under the Texas APA provision on which the en banc majority relies, unless otherwise provided by statute (and no such other statute is suggested here), a person seeking judicial review in a contested case must file his petition in a Travis County district court. *See* TEX. GOV'T CODE ANN. § 2001.176(b)(1) (Vernon 2000).

contrary to existing precedents governing pre-termination procedural due process, 2) based on legal theories not presented by the pleadings, record, and earlier rulings of the case, and 3) unsupported by Texas law. As it stands, the Fifth Circuit's majority opinion is erroneous as a matter of law for all of these reasons, any one of which would be grounds for reversal. The aggregate effect of the en banc majority's compound errors so far departs from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its supervisory power. For this reason, this Court should grant Longview ISD's Petition for Writ of Certiorari.

B. THE EN BANC MAJORITY'S CAUSATION ANALYSIS HOLDS LIABLE THE WRONG STATE ACTOR.

Not only does the en banc majority's analysis call for the Court to correct the three compound errors outlined above, this case also presents an opportunity for the Court to correct and clarify the en banc majority's § 1983 causation analysis, which is the pivotal constitutional issue in this case. The Court should accept this case to clarify that a § 1983 claim based on the denial of procedural due process can be established only against the particular state actor that is responsible for and actually denies the proper opportunity to be heard.

The district court, the panel majority, and the en banc majority each concluded that § 1983 liability could lie against Longview ISD because the District, as Coggin's employer, was the entity responsible under the Texas Education Code for making the final decision concerning Coggin's termination. All three courts concluded that the

District's discharge of Coggin, despite knowing that he had not received any kind of hearing, was the cause of Coggin's constitutional deprivation. The courts' causation analysis, however, overlooked two important matters.

First, the courts incorrectly based their analysis on who deprived Coggin of his property interest in employment rather than on who deprived Coggin of his right to procedural due process. This distinction is critical in the case at bar. In Texas, as perhaps in other states and in other employment contexts, state law divides the responsibility for educator termination between two state actors who have mandatory and exclusive duties: the Governor's appointed Commissioner of Education and the locally elected school board. The Commissioner is responsible exclusively, upon an educator's timely request, for appointing an examiner to conduct a pre-termination hearing.[6] In turn, the school board is responsible for making the final decision with respect to the educator's continued employment, based only on the findings and recommendations of the appointed hearing examiner.[7]

In none of the cases relied upon by the en banc majority[8] or the panel majority[9] was this type of two-actor,

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[6] TEX. EDUC. CODE ANN. § 21.254 (Vernon Supp. 2004).

[7] TEX. EDUC. CODE ANN. §§ 21.258, 21.259 (Vernon 1996).

[8] *McMillan v. Monroe County, Ala.*, 520 U.S. 781 (1997) (petitioner convicted after county sheriff concealed exculpatory evidence from criminal trial); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (high school football coach alleged that racial discrimination motivated his campus reassignment); *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425 (1997) (professor alleged breach of contract claim against university for its failure to hire him).

[9] *Board of County Comm'rs v. Brown*, 520 U.S. 397 (1997) (private citizen arrested by county police officer who used excessive force); *Owen v. City of Independence*, 445 U.S. 622 (1980) (chief of police discharged

(Continued on following page)

two-part, pre-termination process at issue. Consequently, neither the holdings nor the causation analysis therein squarely fit the present case. Indeed, in no case found has this Court been required to undertake a § 1983 causation analysis where state law separates employee termination duties between two or more state actors.

This Court's procedural due process analysis in *Zinermon v. Burch*, 494 U.S. 113 (1990), comes close, but does not fully treat the issue. The Court explains that a state actor's deprivation of a constitutionally protected property or liberty interest is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without adequate process. *Id.* at 125. The Court goes on to state that a constitutional deprivation of a protected interest is not complete when the deprivation occurs; it is not complete unless and until the state actor fails to provide due process. *Id.* at 126.

The *Zinermon* discussion lays the foundation for a rule that the denial of procedural due process, indeed the necessary "direct causal link"[10] can be established only against the entity that is responsible for and actually denies the proper opportunity to be heard, but the Court's holding in that case is limited. Because *Zinermon* involved one state actor, a state mental hospital (and certain employees of the mental hospital) that admitted a mental patient in accordance with Florida state law, the case does

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by the city council pursuant to certain provisions of the city charter); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (concert promoter's entertainment license revoked by the city council pursuant to local practices); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (person's office forcibly entered by deputy sheriffs who had been directed to enter the establishment by the county prosecutor).

[10] *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

not fully contemplate the nature of the present case or of any other multiple state actor fact scenario. Review by this Court is therefore necessary to provide guidance on this critical causation issue.

The second important matter overlooked by the Fifth Circuit is that the en banc majority makes one state actor – Longview ISD – responsible for the action of another – the Commissioner, which is contrary to the long-settled principle of constitutional liability that governmental entities are liable only for their own illegal acts, and are not obliged to control the conduct of others. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79 (1986) (citing *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692 (1978)). The en banc majority, like the panel majority and the district court before it, concluded that the Commissioner erred in his analysis of whether Coggin timely filed his request for a hearing examiner. Ironically, even though the Commissioner was found to be in error, he is no longer a party in this litigation and is therefore unaffected by the rulings and judgments handed down.[11]

The en banc majority imputed the Commissioner's alleged error to Longview ISD and made the District ultimately responsible for the decision of the Commissioner not to appoint a hearing examiner. However, to obtain a pre-termination hearing in Texas, "a teacher must

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[11] Pet'r App. 95. Coggin voluntarily dismissed his claims against the Commissioner and the Texas Education Agency after those parties asserted an Eleventh Amendment immunity defense and the district court indicated in a management conference that it thought the defense was valid. It is the understanding of TASB LAF that, to date, the Commissioner has not changed his practice of requiring all requests for the appointment of a hearing examiner to be received, not mailed, by the 15-day filing deadline established in Texas Education Code § 21.253.

file a written request . . . with the commissioner," not with his school district employer. TEX. EDUC. CODE ANN. § 21.253 (Vernon Supp. 2004). Consequently, the Commissioner is the only individual who can determine the timeliness of the request. It is fundamentally unjust to find the District culpable for the aspect of the two-actor, two-part, pre-termination process over which it has no responsibility or control. To do so, as set out in *Pembaur* and *Monell*, is unconstitutional.

In sum, review by this Court presents an important opportunity for the full treatment of § 1983 causation analysis when multiple state actors are involved and for the reiteration of the long standing principle that one governmental entity cannot be held responsible for the acts of another.

C. THE EN BANC MAJORITY'S ANALYSIS HAS FAR-REACHING, NEGATIVE IMPLICATIONS FOR PUBLIC EMPLOYERS.

Finally, the Fifth Circuit's en banc majority decision has far-reaching implications. First, by holding that Longview ISD was required to permit Coggin to undertake judicial review of the Commissioner's decision before the school board could take final action on his employment contract, the en banc decision adds another layer of pre-termination procedural due process. The additional requirement to await judicial review is not integral to the applicable statutory scheme for Texas educator termination and therefore eliminates all certainty concerning the proper procedural steps. As recognized by dissenting Judge Edith Jones, this case is of far-reaching significance for Texas educators. "Texas's scheme for teacher discipline and terminations . . . was carefully crafted to enhance teachers' rights while ensuring a fast decisional track." Pet'r App. 26. Despite the

Texas Legislature's effort in 1995 to streamline the teacher termination process to a maximum of 90 days, the en banc majority's decision here creates the potential for prolonged, indefinite limbo preventing final decisions by school boards.

Second, the court's holding, as a decision of an en banc court of appeals, provides weighty authority for public employees across this nation to argue that local or state level decisions concerning missed deadlines and noncompliance with procedural prerequisites are not determinative of whether an employee receives a pre-termination hearing. In effect, the court's majority decision opens the door for public employees to tie the hands of public employers, preventing them from taking decisive action if and when a public employee appeals any decision concerning the employee's compliance with statutory prerequisites. The potential for indefinite limbo is an unwarranted intrusion on the government's interest and, as discussed previously, destroys the careful balance struck by this Court in *Loudermill* between the interests of public employees and public employers.

The negative implications of the en banc majority's holding are particularly problematic in today's climate in public education, where the stakes for teacher and student performance have never been higher. Federal and state laws rightly demand highly qualified teachers and steady, adequate academic progress by public school students.[12]

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[12] In 2001, Congress passed the No Child Left Behind Act ("NCLB"), which reauthorizes the Elementary and Secondary Education Act of 1965 ("ESEA"). 20 U.S.C. § 6301 *et seq.* (2003). Primarily, the NCLB conditions the receipt of federal funds on compliance with set standards for student assessment, school accountability, and school improvement. NCLB requires student academic assessments to be

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School boards, school administrators, and teachers serving in this high stakes environment are continually making critical evaluations and decisions about the work performance of subordinates and peers. All stakeholders – administrators, educators, and students alike – deserve a straightforward and decisive resolution of employment disputes. This is especially true in circumstances such as in the case at bar where a school employee is alleged to have engaged in serious employee misconduct involving the mismanagement of public funds and the sexual harassment of co-workers.

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administered in certain school years and certain grades that measure student proficiency in math, reading, science, and language arts. States must separately measure the performance of economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency. Every student group must demonstrate adequate yearly progress on the assessments. Additionally, NCLB requires states to ensure that all teachers are highly qualified. Generally, a highly qualified teacher is one who has obtained full state certification, holds at least a bachelor's degree, and has demonstrated competence in the subject he teaches.

Many states impose academic standards separate from the requirements of NCLB. In Texas, for example, public high school students are required to perform satisfactorily on exit-level assessments before receiving a high school diploma. TEX. EDUC. CODE ANN. § 39.025 (Vernon Supp. 2004). Third, fifth and eighth graders must pass reading and/or math assessments before being promoted to the next academic grade. TEX. EDUC. CODE ANN. § 28.0211 (Vernon Supp. 2004). Further, public school districts and individual campuses receive annual performance ratings based on a school's performance across various academic excellence indicators (*e.g.*, student performance on assessment instruments, student dropout rates, student attendance rates, and others). TEX. EDUC. CODE ANN. § 39.072 (Vernon Supp. 2004). If a Texas campus and/or school district consistently performs poorly, then sanctions up to and including the replacement of campus and/or district leadership can be imposed by the Commissioner of Education. TEX. EDUC. CODE ANN. § 39.131 (Vernon Supp. 2004).

Rather than reinforce the straightforward Texas statutory scheme and the balancing principles established in *Loudermill*, the Fifth Circuit's majority opinion unnecessarily complicates pre-termination process. The opinion sets up the strong possibility for protracted and hotly contested employment litigation, all of which would need to be resolved before the provision of any sort of pre-deprivation hearing. Neither public school resources nor the resources of private individuals should be diverted for such disputes, particularly when the statutory scheme for mid-year educator terminations has not been challenged and the well established constitutional minimums for due process have been satisfied.

IV. CONCLUSION

For the foregoing reasons, TASB LAF respectfully requests that the Court exercise its supervisory power to grant Longview ISD's Petition for Writ of Certiorari. By granting the writ, the Court may correct the en banc majority's three-layered compound error arising from its newfound analysis of timing causation and clarify the appropriate § 1983 causation analysis to be applied when multiple state actors have mandatory and exclusive responsibilities related to the continued employment of public employees.

Respectfully submitted,

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